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INDIAN FISHING RIGHTS

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 727

TO CLARIFY INDIAN TREATIES AND EXECUTIVE ORDERS WITH RESPECT TO FISHING RIGHTS

MARCH 27, 1987
WASHINGTON, DC

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INDIAN FISHING RIGHTS

FRIDAY, MARCH 27, 1987

U.S. Senate,
Select Committee on Indian Affairs,
Washington, DC.

The committee met, pursuant to notice, at 10:05 a.m., in room 485, Russell Senate Office Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII AND CHAIRMAN, SELECT COMMITTEE ON INDIAN AFFAIRS

The Chairman. The hearing will please come to order.

This morning we consider S. 727, a bill which was introduced on March 12 of this year by the Vice Chairman of this committee Senator Daniel J. Evans, for himself and Senators Bradley, Inouye, DeConcini, Adams, and McCain. The purpose of this bill is to clarify that Indian treaties and excutive orders under which Indian tribes are recognized shall be construed to prohibit the imposition of any Federal or State tax on any income derived by tribal members from the exercise of fishing rights.

The bill applies to both subsistence and commercial fishing. S. 727 is similar to an amendment offered in the last Congress by Senator Bradley and Senator Evans, to the Debt Ceiling Bill. The amendment was accepted by the full Senate on August 1, 1986 by unanimous consent. For reasons unrelated to the merits of the amendment, however, the amendment did not survive conference on the Debt Ceiling legislation.

Prior to the adoption of the Bradley/Evans amendment, 33 Senators joined Senator Bradley in a letter to the Internal Revenue Service and the Department of Justice urging those agencies to accept the position of the Department of the Interior supporting exemption of income from treaty fishing from Federal income taxation. The letter was bipartisan and enjoyed the support of both Republican and Democratic Senators from both east and west.

[The text of S. 727 follows:]

II

100TH CONGRESS
1ST SESSION

S. 727

To clarify Indian treaties and executive orders with respect to fishing rights.

IN THE SENATE OF THE UNITED STATES

MARCH 12, 1987

Mr. EVANS (for himself, Mr. BRADLEY, Mr. INOUYE, Mr. DECONCINI, Mr. ADAMS, and Mr. MCCAIN) introduced the following bill; which was read twice and referred to the Select Committee on Indian Affairs

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A BILL

To clarify Indian treaties and executive orders with respect to fishing rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. INDIAN FISHING RIGHTS.

(a) That the Act of March 3, 1871 (c. 120, sec. 1, 16 Stat. 566; 25 U.S.C. 71), is amended by adding the following proviso at the end thereof: "*Provided,* That such treaties and any executive orders under which any Indian tribe is recognized, shall be construed to prohibit the imposition, under Federal law or under any law of a State or political subdivision thereof, of any tax on any income derived by an Indian from the exercise of rights to fish secured by such treaty or executive order, regardless of whether such rights are limited to subsistence or commercial fishing.".

(b) The provisions of this Act shall apply to any period for which the statute of limitations or any other bar to assessing tax has not expired.

The CHAIRMAN. This morning we are honored and privileged to have with us the author of the amendment that was adopted by the Senate during the last 99th Congress. May I welcome Senator Bill Bradley, our distinguished Senator from New Jersey.

Please proceed, sir.

STATEMENT OF BILL BRADLEY, U.S. SENATOR FROM NEW JERSEY

Senator BRADLEY. Thank you very much, Mr. Chairman, for the opportunity to testify on this issue. I compliment you on your speedy consideration of this legislation. I know that it has just been 2 weeks since we introduced the legislation to clarify Indian treaty fishing rights.

Last year I became involved with this issue when the plight of the Lummi Tribe came to my attention. The Lummi were rightfully upset when the IRS determined that fishing income would be taxable unless the treaty contained language specifically conferring income tax exemption. This struck me as a strange logic to apply to treaties that were negotiated as long ago as the 1850's, over six decades before a federal income tax that was even allowed by the Constitution. I am sure that had the Indian treaty negotiators known that someday there would be an Internal Revenue Service and an income tax, they would have been sure to seek a tax exemption at the time of the treaty negotiation.

Last spring, as you pointed out, 33 U.S. Senators joined me in signing a letter telling the IRS and the Justice Department that the Indian claims are of substantial merit. These Senators, as you likewise pointed out, were Republican, Democrat, easterners, and westerners. It was a broad-based group. We had the administration's own Department of Interior on our side. I might say they have been a strong advocate of the Lummi's position throughout.

It was my hope then that the Justice Department might have listened to reason and seen the logic of the Lummi position. They did not. This legislation is designed to settle the issue once and for all.

As the 99th Congress drew to a close, as you also pointed out in your opening statement, I offered an amendment to the Debt Ceiling Bill with Senator Evans. This amendment was adopted unanimously. Unfortunately, the House refused to act on any amendment to the bill and these efforts were stalled.

Mr. Chairman, we will, I think, not be stopped in this Congress. In addition to your leadership and the leadership of the ranking member of the Select Indian Affairs Committee, Senators DeConcini, Adams, and McCain have joined as co-sponsors of this legislation.

Again, let me just reiterate, the support is solid and broadly-based. The Department of Interior estimates that the tax revenue involved here is small, roughly $70,000 a year. What is at stake, however, is more substantial. The U.S. policy of respect and support for treaties with American Indian tribes is an international display of our Nation's commitment to justice and human rights.

American Indian treaties should not be subject to further erosion through unilateral reversals of long established principles.

Mr. Chairman, I hope that early action by your committee and prompt action by the full Senate will settle this matter and reaffirm our commitment to honor the treaty with the Lummi Tribe.

[Prepared statement of Senator Bradley appears in the appendix.]

The Chairman. I thank you very much, sir.

I think that you may be helpful to this committee in providing the legislative intent of the Congress. I think it is pretty clear that if you happen to be a member of a federally recognized tribe and you are fishing in a river that runs through the reservation, there would be no question.

But there are some tribes, like the Lummi that you mentioned, that carry on aquaculture operations. Was it your intention to make certain that these operations be treaty protected? Do you think that this bill is broad enough to cover that type of activity?

Senator Bradley. Yes; I do. The treaty that was entered into reserved the right to hunting and fishing at usual and accustomed places. I would include the aquaculture under that.

The Chairman. What if it is "outside the usual and accustomed fishing areas?" Let us say in the Puget sound area.

Senator Bradley. I think it depends on the historical pattern of fishing. The historical pattern of fishing would, under my reading of the treaty, be protected.

The Chairman. There is another type of activity that we are trying to cover. If the bill is not sufficiently broad, I think amendments can be made.

Since the time of the treaties, different business entities have been created—partnerships, corporations and such. Are these entities covered by this measure?

Senator Bradley. The entities are not specifically covered. But any income derived from the reserved resources would be covered. So if the income is related to the reserved resources, it would be exempt from taxation.

The Chairman. Your statement and your responses have been extremely important to us. I thank you very much.

We have with us the author of the measure S. 727, Senator Evans.

Senator Evans. Thank you. Mr. Chairman.

I am delighted to have our distinguished colleague from New Jersey here. He has been a leader from the very beginning in this effort and I was proud to join with him during the last Congress in an attempt to get this problem resolved. We came pretty close. We did all right on the Senate side. I think through more of the difficulties between the House and the Senate, having little to do with the bill itself, we got shut off. But we will try again. I am delighted to have him here personally and to be part of this important correction in what we think is a mistaken interpretation by the IRS.

[Prepared statement of Senator Evans appears in the appendix.]

The Chairman. Thank you very much.

Senator Bradley. Thank you very much, Mr. Chairman. And thank you, Senator Evans.

The Chairman. I have received word from the distinguished Senator from Washington, Brock Adams. He is presently at a meeting with another committee and it unable to be with us today. He has asked that a statement in support of S. 727 be made part of the record. Without objection, so ordered.

[Prepared statement of Senator Adams appears in the appendix.]

The CHAIRMAN. Now we have our first panel. Mr. Jewell James, a member of the Lummi Tribe of Bellingham, WA. Mr. Stan Jones, Sr., chairman of the Tulalip Tribe of Marysville, WA. Mr. Daniel Jordan, member of the Hoopa Valley Business Council of Hoopa, CA. Mr. Billy Frank, chairman of the Northwest Indian Fish Commission, Olympia, WA. Mr. Mason Morisset, Esq., of Pirtle, Morisset, Schlosser & Ayer of Seattle, WA.

Gentlemen, will you come forward.

I have been advised that my dear friend, Chairman Billy Frank, will be the first witness. It is your show, Mr. Chairman.

STATEMENT OF BILLY FRANK, JR., CHAIRMAN NORTHWEST INDIAN FISHERIES COMMISSION, OLYMPIA, WA

Mr. FRANK. Thank you, Mr. Chairman.

I am bill Frank, Jr., chairman of the Northwest Indian Fish Commission, supporting S. 727. It is rather an honor to come in today and be able to give you a little bit of our story out in the northwest.

It is good to see our Senator, Dan Evans, here.

Mr. Chairman, one of the questions we had while we were traveling the northwest and the chairman came to our country a month or so ago, one of the questions that you asked me was if our treaty rights were being violated. I indicated some of the things that were taking place. Here we are today talking about tax exemption and trying to maybe solve this problem, hopefully once and for all, as far as interpreting our treaty rights and what they said.

I just wanted to make some statements pertaining to our testimony, giving you an idea of where we are in the northwest as Indian people, and throughout the country.

My father died when he was 104 years old. He lived up on the Nisqually River all of his life. I am 55 years old now. I have three children that are growing up. That could be any one of us in the northwest. That could be any drainage that I talked about. That could be the Nooksak River that the Lummi Tribe is on. It could be the Snohomish River that Tulalip is on. It could be any one of those Indian people that live on the those watershed.

But it seems like all of my life I have tried to work to uphold the treaty rights, and I have been to court in the U.S. Supreme Court and have been affirmed by the U.S. Supreme Court seven times on the treaty rights fishing in the northwest. Hopefully the law is behind us now. We can go on with some stability in the northwest, putting that fishery back together as co-managers out there and as co-managers of the whole resource, putting those drainages and watersheds back together, working together with everyone in the northwest.

This tax that is facing us today has no stability in Indian country. When you have the tax people coming down, tying up our boats or threatening to take what little money the Indian people have out of the bank, or maybe putting a compensation to their house or their house trailer or their pick-up truck, or whatever they have.

Our people are not people that are making a lot of money. The chairman looked at our country and where we live. We live in communities—I represent 20 tribes in the northwest. There are 20 tribes that have resolutions supporting this bill that we have, S. 727.

We would like to have some stability in our lives. We always have to come to Congress to try to get that stability.

It seems like somebody is always taking us to court or challenging that treaty right. Always challenging it. Always and always, from generation to generation. We always have to come to Congress to solve some of these problems. Congress has been very, very fair to the Indian people.

We have some good people back here who are willing to take some of these jobs on and support our treaty rights.

I think that the record should stay open because we have some other tribes that are going to send testimony in, some of the smaller tribes and some of the bigger tribes. Hopefully their testimony will be on the record as supporting this bill.

Thank you.

[Prepared statement of Mr. Frank appears in the appendix.]

The CHAIRMAN. As we do in all hearings, the record will be kept open for 10 days. Your completed statement, dated March 27, will also be made part of the record. All of your prepared statements will be made part of the record, in addition to your statements made in person here.

Who is the next witness?

Mr. FRANK. Jewell James

The CHAIRMAN. Our next witness is Mr. James, a member of the Lummi Tribe.

STATEMENT OF JEWELL JAMES, COORDINATOR, TREATY PROTECTION TASK FORCE, LUMMI INDIAN TRIBE, BELLINGHAM, WA

Mr. JAMES. Thank you, Mr. Chairman.

I would like to thank this committee for giving us the honor to testify before it. We are very concerned about S. 727. I feel privileged to be able to submit our testimony.

My name is Jewell James. I am a member of the Lummi Indian Tribe. I am the coordinator of the Lummi Treaty Protection Task Force and coordinator for the Treaty Tribes of the Pacific Northwest. The Treaty Tribes of the Pacific Northwest are the 20 tribes that are party to the Boldt decision as it is known, *United States* v. *Washington*.

We organized in 1982 when we learned of the case called *Earl* v. *Commissioner*, which was a tax case. It was decided, in the Tax Court, that the Federal income tax laws were being applied and are "applicable" to the treaty income of the treaty Indians of the Pacific Northwest.

It is the understanding of the tribes in the Pacific Northwest that the treaty between the United States and ourselves had reserved for us resources, both faunal and floral, and fish resources that we have always been dependent upon in the marine waters and the river waters for our ceremonial, subsistence and commercial purposes.

It is our request of the Senate that the committee clarify the intent of the U.S. Congress, that it has never been the U.S. Government's intention to apply the tax laws, the Federal tax laws to our fish resources. We are very upset. We have taken this to tribes throughout the United States. We have talked to both regional and national, as well as international organizations in addressing our treaty rights. We have, throughout the United States, come up with a consistent and common goal amongst treaty tribes and Executive order tribes and Federal statutory recognized tribes that are concerned about resources that are reserved for our people as well as our children several generations away.

We think it is erroneous for the Internal Revenue Service to believe that they can apply the Federal income tax laws to resources and the incomes derived from the harvesting of such resources by tribes and enrolled members of the tribes.

We are requesting that the committee review our records that we are submitting and allow us time to submit the support documents that we have gathered, both regionally and nationwide, from tribes that are concerned about S. 727, as well as the Indian Fishing Rights amendment that was added to the Debt Ceiling Bill, H.J. Res. 668 in 1986 by Senators Bradley and Evans.

The CHAIRMAN. Can these supporting documents be provided to us within 10 days?

Mr. JAMES. Yes sir.

The CHAIRMAN. They will be made part of the record.

Mr. JAMES. Thank you.

[Prepared statement of Mr. James appears in the appendix; supporting documents retained in committee files.]

The CHAIRMAN. Who is the next witness?

Mr. FRANK. Danny Jordan.

The CHAIRMAN. He is a member of the Hoopa Valley Business Council.

STATEMENT OF DANIEL E. JORDAN, COUNCIL MEMBER, HOOPA VALLEY TRIBE, HOOPA, CA

Mr. JORDAN. Good morning, Mr. Chairman, Senator Evans.

My name is Daniel Jordan, councilmember for the Hoopa Valley Tribe of California. With our fisheries biologists, Mike Orcutt and Bob Hannah, I am proud to say that I was the tribal representative for the Klamath River harvest allocation negotiations, which has resulted in a 5-year agreement that we expect to be fully ratified by mid-April.

I appreciate being given the opportunity to testify on this legislation which is extremely important to Indian tribal fishing rights and the exercise of those rights.

The Hoopa Valley Indian Reservation is the largest reservation in California. The Indian fishing areas consist of the Hoopa Square, which is the traditional homeland of the Hoopa Tribe, and areas along the lower parts of the Klamath River, the traditional home of the Yurok Tribe. These areas were established as reservations by three separate Executive orders between 1855 and 1891. The reservation boundary status has been in constant litigation for over two decades.

The fishery resource for thousands of years has been central to the survival of the Hoopa Valley Tribe and has served its religious, subsistence and economic needs. For this reason, the Executive orders creating the reservations were centered around the Trinity and Klamath Rivers. The rights of tribal fisheries on Klamath and Trinity Rivers has been upheld by court decisions such as *Mattz* v. *Arnett, California* v. *Andrus, California* v. *Watt, People* v. *McCovey*, and many others.

The Hoopa Tribe has been involved with fishery management issues for years and has our own tribal fishing ordinance and court system, and has maintained a well-qualified and experienced fisheries department.

We have been very concerned about the Internal Revenue Service [IRS] tax issue for the past few years because of the economic impact on our tribal members. The major natural resources of our reservation are timber and fisheries. With the decline of the lumber market, the free exercise of our fishing rights becomes critical to our tribe's long term well-being.

Frankly, I was quite amazed that the IRS could overlook what we understood as long-standing principles for interpreting Indian rights. We fully concur with the statement of Senator Adams when he said, "It is a sorry sight when the Federal Government, pledged by law to protect treaty interests of native American people, fails in that duty and permits unwarranted legal persecution. It is particularly unfortunate in a case like this when established principles of law so clearly favor the traditional fisherman."

Fishing rights, when owned by a tribe, are not taxable. However, according to the IRS, when tribal members exercise that right, it becomes taxable. Taxation places an economic burden on the exercise of that right. If an Indian must pay to exercise the tribe's fishing right, then that right is meaningless.

I would like to point out that it is our understanding of the term "Indian" in the legislation to mean an enrolled member of a federally recognized tribe. Clearly, this was the intent of neither the tribes nor the U.S. representatives during treaty negotiations.

Having a right on the one hand, but being taxed for exercising that right on the other, only makes a mockery of the negotiation process. As was stated by the courts in one case, "It acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve."

We fully support passage of the legislation that makes it clear that income derived from exercise of reserved rights is not taxable. Tribes are not fighting for what is not rightfully theirs. They are fighting to keep what little they have left of what is rightfully theirs.

We appreciate the efforts of the Senators who have taken an aggressive stand opposing the taxation of fishing income. The introduction of this legislation shows a commitment to resolving rather than creating problems in the Indian country. We urge a swift passage of this legislation and pledge our support wherever needed.

Thank you.

[Prepared statement of Mr. Jordan appears in the appendix.]

The **Chairman**. Thank you very much, Mr. Jordan.

Mr. **Frank**. Next is the chairman of the Tulalip Tribe, Stan Jones.

The **Chairman**. Mr. Jones.

STATEMENT OF STANLEY G. JONES, SR., CHAIRMAN, TULALIP TRIBES OF WASHINGTON, MARYSVILLE, WA

Mr. **Jones**. Thank you, Mr. Chairman, for calling the committee together and taking this speedy action to resolve some of the issues that are so important to our people. It is good to see our Senator, Senator Evans, again. I appreciate seeing you again. I will read my statement.

Mr. Chairman, I am Stanley G. Jones, Sr. I am chairman of the board of directors of the Tulalip Tribes of Washington. I have a written statement which I will submit for the record. In the interest of time I will summarize it.

On behalf of the board of directors of the Tulalip Tribes I would like to thank you and the committee for this opportunity to present the views and recommendations of the Tulalip Tribes concerning S. 727. This bill will clarify the tax status of income derived from the exercise of fishing rights secured by treaties and Executive orders. We commend you and the co-sponsors of this vital Indian measure. This legislation will reaffirm the meaning and intent of the treaties entered into between the Government of the United States and the Washington Indian tribes in 1855, and will confirm the Federal Government's trust responsibilities under those treaties.

The Tulalip Tribes recommend passage of S. 727. Its enactment will stand as a clear signal to all that the United States honors its word. If after all these years the IRS, supported by the U.S. Department of Justice, can arbitrarily, retroactively and unilaterally reinterpret the intent of our treaty, what faith or security can any nation have in the solemn pledges of the United States?

Fishing is as important to us today as it was in 1855. I am a full time fisherman myself. As it did in treaty times, fishing continues to serve as a mainstay of our cultural and our religious practices and our economy. When asked how many of our members are fishermen, we often say that we all are fishermen.

The paddles on our ceremonial regalia signify that we are the canoe people. The carved salmons on our regalia likewise signify we are the fisher people. Even for those who do not fish as the main source of their income, fishing serves as some part of their subsistence and as an important cultural and religious event.

On the Tulalip Reservation and other reservations throughout the northwest, income from fishing often supports an extended family. Various members of a family will spend some or all of their time engaged in fishing. We wish to encourage this since it continues our way of life and provides a means of livelihood free from Government welfare programs.

President Reagan, in his Indian policy statement in 1983, stressed the importance of encouraging economic development and self-sufficiency. The most cost effective job program to encourage economic self-sufficiency among our people is to sustain our treaty fishing right free from Federal taxation.

Historically, both the tribes and the United States have recognized that treaty fishing income is not subject to taxation. Until recently the IRS did not think so either. But in an amazing exercise of imagination it decided that in 1855 our ancestors, unable to see some 60 years in the future, failed to specifically say the magic words: forever exempt from Federal income tax. While the negotiator from the United States are credited with intentionally leaving out these same words, we are even more surprised that the Justice Department agrees with the IRS. We also reject the IRS argument that Congress intended to abrogate any part of the treaties when it passed the Internal Revenue Code. If the IRS approach is adopted, all treaty rights and trust resources will be in danger.

Mr. Chairman, the United States assured the tribes that the treaties would secure the fishing rights. Governor Stevens, the chief negotiators for the United States, said, "This paper secures your fish." In fact, the fishery is the principle economic resource reserved under the treaties by western Washington tribes. The vital importance has not diminished with time.

I want to emphasize in closing that the northwest Indian tribes paid a heavy price in the bargain they struck with the United States by giving up millions of acres of land of their traditional homeland. We believe the treaty secured our fishing rights for all time. We urge this committee to move quickly for enactment of this bill to uphold the words of the Federal Government in the treaties under consideration as well as those affecting other tribes across the country.

The Tulalip Tribes will submit additional material supporting our position on S. 727, and setting forth any amendments we may want to suggest.

Thank you, Mr. Chairman, and members of the committee.

[Prepared statement of Mr. Jones appears in the appendix.]

The CHAIRMAN. Thank you very much.

I gather the last witness is Mr. Morisset.

STATEMENT OF MASON D. MORISSET, ATTORNEY, PIRTLE, MORISSET, SCHOLOSSER & AYER

Mr. MORISSET. Thank you, Mr. Chairman.

I do also appreciate the chance to appear before you today on behalf of the fishing tribes. I am currently counsel for the Tulalip Tribes, Mr. Stan Jones. Our firm is also counsel for the Hoopa Tribe, Mr. Danny Jordan. I have in the past served as counsel for the Lummis and continue to work with them and their current counsel. I have been counsel and advisor to the Northwest Indian Fish Commission from time to time, and have worked with Billy Frank since we started fishing rights litigation 17 long years ago.

So my remarks, I thank, are the result of a concensus between us as to what we think this legislation means.

I was particularly interested in the chairman's questions to Senator Bradley and his comments and answers. I think I can say that we generally agree with those. The tribal leaders here today and other tribal leaders with whom I have been in touch and other tribal attorneys have asked me to summarize what we think this legislation means, for we have engaged now in 17 years of litigation over the meanings of the treaties and have, quite frankly, become frustrated with the endless quibbling that goes on over the words.

I think Senator Adams, in his remarks in the Congressional Record of March 12, put it very well when he said, "I hope to send a message to the IRS that Congress feels strongly that revenues from tribal resources protected by treaties or Executive orders are generally not subject to taxation, and that we will strongly disapprove of attempts to evade or ignore this policy."

Therefore, we would just like to underscore, and I think I speak for everyone here, that we assume the legislation is to be broadly read and that it includes within its meaning the concept that "Indian" means a duly enrolled member of an Indian tribe and any corporation, partnership or other business entity 100 percent owned by such Indian.

Many tribal lawyers such as myself have encouraged the Indians to use modern business mechanisms where possible. We do not want to have to get into an argument over the precise way that an Indian may be exercising his right.

Second, we are assuming the legislation covers fishing activity broadly defined, so that we do not have arguments about fishing. We have had these arguments. These are not things that I am dreaming up. We have had litigation about these words. It is our assumption that the legislation covers fishing activity which includes the harvest or capture, by net, hook, spear, traps, weirs, or otherwise, of all species of fish, shellfish and marine life that may be included in the treaty, Executive order, or a Congressional action.

We assume that fishing activity includes assisting another Indian in such activity when that activity takes place within the exterior boundaries of a federally recognized reservation, or at usual and accustomed places, within or without an Indian reservation.

We assume that fishing activity further includes buying, selling, re-selling fish or fish products to processor, warehouse, trade, exporter, retailer, or ultimate consumer, when again, that activity is undertaken by an Indian or Indian tribe.

Once again, this is to avoid arguments about exactly what activity it is the Indians are engaged in.

Third, when we assume that usual and accustomed places are included, we assume the legislation means to include all places, grounds, stations, sites or locations secured to Indians by treaty, Executive order or Congressional act for the benefit of Indians. Again, by way of an aside, Mr. Chairman, we have had arguments going all the way to trial over whether a place where an Indian traditionally fished is a place or a station or a ground or something else. The courts have rightly said, it does not make much difference exactly what word we use. But we want to make it clear that we do not want to have to relitigate those things with IRS.

Fourth, we are assuming that assisting in a fishing activity includes working as a crewmember on a boat or vessel owned by an Indian or Indian tribe, and working as an employee of an Indian or Indian tribe when engaged in a fishing activity.

Finally, we assume that when we discuss Indian tribes, the legislation covers Indian tribes meaning federally recognized Indian tribes with fishing rights secured by treaty, Executive order or Congressional act, including business entities that might be 100 percent owned by such tribes.

Some tribes have formed, again on our advice often, separate business entities to deal with fishing activities.

This is my understanding of the views of the rest of the gentlemen at the table and the people they represent, that they do not want to have to repeat what unfortunately we have had to undertake with regard to much fishing litigation in the country. That is a case-by-case, nitpicking argument over particular terms. When we talk about fishing we mean broadly defined rights that have already been recognized, either by this body, the Congress of the United States, first the Senate in enacting the treaties, or the entire Congress in enacting an Act of Congress, or by the Executive in an Executive order.

If the rights have been recognized and preserved in any one of those ways, we assume the legislation is meant to broadly cover the terms I have mentioned.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Morisset appears in the appendix.]

The CHAIRMAN. Thank you very much.

We hope that this measure, if passed, will clarify and not confuse the present situation any further.

As a matter of clarification for myself, an Indian is a person who is a member of a federally recognized Indian tribe. Is that your definition?

Mr. MORISSET. That is correct, as I understand it.

The CHAIRMAN. In other words, Mr. Earl, in the case of *Earl* v. *Commissioner*, would not be covered by this treaty.

Mr. MORISSET. There is some question. As you know, he was not represented by counsel.

The CHAIRMAN. But the facts also indicate that he was not a member?

Mr. MORISSET. That is not clear. I thought that Earl was a Pualip, and he was enrolled. I think he is an enrolled member of the Pualip Tribe, which is a federally recognized Indian tribe.

The *Earl* case presents numerous other difficulties in that he was not on an Indian owned boat. He was not actually fishing. He was engaged as a cook, as an employee. I do not believe they were fishing within usual and accustomed Pualip fishing places.

The CHAIRMAN. So in other words, he was not covered by the treaty.

Mr. MORISSET. I get very irate about the *Earl* case because I think it should have been dealing with cumquats or something. It was not a fishing rights case, and yet the Tax Court kind of used it as a vehicle to put a nail in his coffin.

The CHAIRMAN. I should point out at this juncture that if recommendations are made to clarify this measure, and if such recommendations involve amending the Internal Revenue Code, then this bill comes within the jurisdiction of the Finance Committee. If it does get into the Finance Committee then we have no way of assuring its passage or amendments. So we are trying to keep within the proper bounds of the jurisdiction of this select committee.

You have indicated that tribal fishermen whose income is derived from commercial fishing outside the usual and accustomed fishing areas should pay Federal taxes. Is that your interpretation?

Mr. **Morisset**. I will never say that any Indian should pay Federal taxes, Mr. Chairman. But certainly the bill that we are concerned with and the rights that we have all dealt with are rights guaranteed by treaty, Executive order, or Congressional act. Virtually every case that I know of, and I have dealt with a lot of cases throughout the country, as well as this one intimately, those are place specific.

In the northwest treaties they are place specific. They talk about usual and accustomed places. If you are outside that protection, you are not exercising a treaty right. You are doing something else.

So in our case an Indian who fishes off the coast of Oregon, there are no usual and accustomed fishing places for Washington tribes. There may be for Oregon. I think there are. But a northwest Indian fishing off Oregon would not be exercising a treaty right. would not fall within any of the definitions I just testified to. Therefore, his income would be taxable if otherwise taxable under the code.

The **Chairman**. In other words, if an Indian tribe should purchase an ocean-going vessel and sail out beyond the 200-mile zone, which history shows that they never fished before, and caught fish out there, that income would not be covered by this treaty.

Mr. **Morisset**. That would be my understanding. We have determined in Federal court the westward ocean limits of some tribes. That has been an issue of dispute, how many miles out. Where the court has made that determination, it said it was latitude so-and-so or whatever, once you get beyond that, if you were to go out in a vessel, you would again not be exercising the treaty right. Therefore, you would not fall within this bill.

The **Chairman**. You spoke of Indian owned vessels. There are all sorts of legal entities. Partnerships, corporations, majority ownership, minority ownership. What do you have in mind?

Mr. **Morisset**. The tribes are all working on the question of ownership in somewhat different ways. The typical situation now is 100 percent ownership. I know a lot of tribal fishermen personally—in fact, all that I know do that. I would presume that at some point you would need to define—and I do not know that we addressed that specific issue here—whether or not having a majority interest in a boat is ownership, as opposed to having a 100-percent interest in a boat. I would presume it would be like numerous other precedents in Federal law.

For example, whether or not an Indian business is an Indian business for procurement. That would be a 51-percent ownership. Most Indians do not own boats with anyone else, that I know of. Mr. Jones says the bank owns them.

Senator **Evans**. That is in common with other citizens of the territory.

Mr. **Morisset**. Yes, Senator.

The **Chairman**. I can see the coverage including the initial catching of the fish and the selling of the fish. Does it include also the process involved in canning the fish and then selling it? Where does the coverage end?

Mr. MORISSET. It is our understanding that it would when that activity is carried out by an Indian, as defined, or an Indian tribe, as defined. Once again, we have encouraged the tribes to try to gain more benefit from this resource other than just selling the fish, and then they are at the bottom of the economic pyramid. We have encouraged them to try to develop their own marketing, to develop processing, so that they gain the extra value from the resource.

I think it is our understanding that if a tribe, for example, enters into a cannery—I do not think we have any but I would like to see that—if the tribe sends its fishermen out, the fishermen bring in the fish, they then put the service on there to increase its value, can it and market it, that the income from that is still directly derived from the treaty protected activity.

The CHAIRMAN. Senator Evans.

Senator EVANS. Thank you, Mr. Chairman.

First, let me welcome my colleagues from the northwest and from the State of Washington. We have had many, many opportunities to work together. I should say before this committee and before the audience that Billy, when you talk about seven for seven in front of the Supreme Court, that ain't bad. That should pretty clearly establish the rights.

I think over the years it is safe to say that we have gradually moved away from the courts and have embarked on what I think is a remarkably productive relationship in trying to do what ultimately has to be done. And that is, produce more fish so that the needs of all citizens are well handled. I think the leadership you all have shown in that effort is really remarkable and to be commended.

Let me first ask about some technical and legal questions, and I asked them as a non-lawyer. Mason, maybe you can handle this.

First, what would be the circumstance if there were to be Indian members of a crew on a non-Indian owned boat. In the first place, if you are fishing in non-Indian waters, and let us assume for the moment that 50 percent of the crew members and the share of earnings went to Indian members and 50 percent to non-Indian members. But the boat happened to be owned by a non-Indian.

In the first place, how would you allocate the cash in terms of the *Boldt* decision? Where does that 50 percent—and Mr. Chairman, under the *Boldt* decision, as you probably know, 50 percent of the total catch within these limits goes to non-Indians and 50 percent to the various treaty tribes.

Senator MURKOWSKI. Would you yield for a question?

Senator EVANS. Yes.

Senator MURKOWSKI. Do the Indians have to catch the fish?

Senator EVANS. It is an opportunity to catch?

Senator MURKOWSKI. They do not have to catch the fish? They are entitled to half the fish caught in that area whether they catch them or not?

Senator EVANS. No; I think that the effort is to try to manage the fishing resource so that there is clearly the opportunity to catch. Hopefully a catch that is as close to a 50-50 between Indian fishermen and non-Indian fishermen.

Senator MURKOWSKI. They have to catch?

Senator EVANS. Yes.

Senator MURKOWSKI. They can catch up to half? They are not entitled to half unless they catch that half?

Senator EVANS. That is correct. Mason, is that not an accurate interpretation?

Mr. MORISSET. That is correct, Senator Evans. The court has said that all fish caught by an Indian count in their allocation, wherever caught.

Senator EVANS. So in this circumstance I have just mentioned, presumably half of that catch, to the degree it accrued to the Indian members of the crew in terms of their dollar share of the catch——

Mr. MORISSET. Not necessarily as to that point. If the fish are allocated according to the boat and/or license they are reported on—they are reported on fish tickets, in that case the fish would probably be allocated to the non-Indian owner, to his license and his boat. Those would not be considered Indian-caught fish because those people would be working, if they were working as an employee. If they were actually partners then there might be a different question.

Senator EVANS. Say they were working as employees in a non-Indian owned boat but they were catching fish in treaty waters. Under your interpretation of this proposal or the more basic treaty rights, would they or would they not under that circumstance be subject to income tax on their earnings?

Mr. MORISSET. It is not clear that that would be covered by this legislation. That is an intriguing concept. I am not sure——

Senator EVANS. I am not sure how many circumstances there are. Maybe Billy or some of the rest of you may know, or Jewell. I would guess that that is not a common circumstance.

Mr. MORISSET. No; I was going to say, Mr. James or Mr. Jones might like to answer that.

Mr. JAMES. Yes, Senator; we have a very large fleet and we are very concerned with regard to the exercising of the treaty rights with regard to the non-taxability of exercising that right.

Exercising that right is regulated by the tribes for their members. It is our position that the tax exempt status would not be for rent, lease or sale to anybody that is not an enrolled member of an Indian tribe recognized by the treaty or an Executive order or statute that is applicable to the area in question or the resources that are being harvested.

Senator EVANS. I understand that. In the first place, as I understand it, that is not a very common circumstances to have a mixed crew. Either it is total Indian crew or a total non-Indian crew.

Mr. JAMES. No; it is not very common. In fact, with regard to the Lummi Indian Tribe, it is strictly prohibited and enforced by the tribal government. It is to be 100 percent Indian owned and operated. The harvesting is to be conducted by a Lummi tribal member.

Senator EVANS. Again, in the interpretation of the breadth of this coverage, I am intrigued by whether this would or would not cover the processing or the various stages from catch to the ultimate consumer, to the degree that those various stages were thoroughly and completely Indian owned and Indian run. If there were to be freezing plants, canning plants, other things on the reservation and run by Indians, how does that relate back, in your view, to the original treaty, which of course at that time did not contemplate the kinds of storage and development methods we have now?

Mr. **Morisset**. First of all, let me reiterate that we have identified—It is our understanding that an Indian or Indian tribe or any business entity means 100 percent owned. I forgot to mention that.

So I think in your hypothetical that would not be covered. That boat is not 100 percent owned. In the case of a freezing station or a processing station 100 percent owned by an Indian tribe or individual, we would presume that is covered.

There is substantial support in this, Senator Evans, in the historical and anthropological reports of the tribes, which are all a matter of court record. In that the tribes used fishing as a basis for commerce. They just did not eat fish. They did not can it because nobody had canneries back then.

But they dried it and traded, and used that trade as a major part of the early economy of our State, even though it was a territory, to trade in other goods—cedar and bark and hides and artifacts.

Senator **Evans**. In that case, dried salmon particularly became almost a form of money. It was clearly a processed fish and was utilized to gain other goods in exchange.

Mr. **Morisset**. That is true. As you will recall from your days as Governor, we had to deal with the argument that the Indians did not have gill netters or gasoline powered boats, and therefore should not be allowed to use those today. The court said, nonsense. We have got to update this.

Senator **Evans**. They did not have competition either in those days.

Mr. **Morisset**. That is right. By analogy we would say the same thing now, as if they traded in a particular way at treaty times, today they are going to trade through modern commerce. That is merely a recognition.

Senator **Evans**. An equivalency.

Mr. **Morisset**. An equivalent of what they did at treaty time.

Senator **Evans**. Do you know at this point how many cases are pending in this IRS effort to collect taxes from Indian tribal members or tribal entities?

Mr. **James**. For the Lummi Indian Tribe we have approximately 70 that have been initiated to date.

Senator **Evans**. Seven?

Mr. **James**. There are approximately 70 cases pending.

Senator **Evans**. Approximately 70 cases.

Mr. **James**. Approximately 27 of them are nearing completion with regard to processing through the Tax Court.

Mr. **Morisset**. Senator?

Senator **Evans**. Yes.

Mr. **Morisset**. Excuse me. I should add that there are probably 30 or 40 other cases in the area at various other stages, under audit by IRS, and so on.

Senator **Evans**. I am curious. Jewell, do you know the approximate status of those 70 cases, what would be the average yearly income gained from fishing of those tribal members?

Mr. **James**. Well Senator, we have different sizes of fishing vessels. Each vessel will gross a different amount. With regard to whether or not there is net income back that would put you in a profitable area is highly questionable. We did conduct a study a few years back to determine where exactly our fleet was with regard to the amount of investments our people were placing into gearing up for the exercising of the rights that were confirmed by the court.

We found out a large majority of the tribal fishing population was just barely making a living off the right itself. So, as a consequence, we have been placing a lot more emphasis with regard to controlling the amount of vessles that are entering the fishery.

Senator **Evans**. If you are just talking about a non-Indian fishing and subject to tax, obviously their gross income has an offset of the costs before you get to any kind of net income that is subject to taxation. Would you say that the average net income of these tribal members who are being charged by the IRS would be over or under $10,000 of taxable income on a yearly basis.

Mr. **James**. I guess I will not be able to truly say exactly what is going to be the final taxable income on an average basis. The IRS has gone in and identified the top members of our fleet. We do have approximately 368 fishing vessels that do employ 1,058 tribal members. The IRS targeting upon the top 70 fishing vessels has not really come out yet with a yearly average as to what is going to be taxable if deductions are allowed.

In fact, we just recently had several members that were targeted by the IRS that received notice that they would not be allowed any deductions and that they would have to pay all interest and penalties going back 5 to 7 years, depending on the individual. So it is really hard to say exactly what is going to be taxed in the end.

Senator **Evans**. I guess it is safe to say, however, that the IRS is not chasing any multi-millionaires.

Mr. **James**. It is very safe to say that.

Senator **Evans**. It just seems to me that this is an extraordinarily unproductive way for the IRS to use its efforts, even if there was some legitimacy to what they were doing. It seems to me they ought to be chasing the large taxpayer, the large evader of taxes, the place where they could be most productive in their efforts. They are spending way too much effort on something that at best is highly questionable, and at worst will not bring them much in terms of revenue.

Mr. **Frank**. Senator, one of the things that, as Jewell was saying, the Internal Revenue Service came out through Indian country in the case area. They did not just pick the top people. One of our members of the Nisqually Tribe also has a 90 day letter, so to speak, which starts the process of ending up where we are going to end up as far as putting that Indian on notice that you have to prove whatever you want to prove.

So it is throughout our area out there that they have identified a lot of our tribal members. The process has started.

Senator **Evans**. Thank you, Mr. Chairman.

The **Chairman**. Thank you, Senator Evans. Senator Murkowski.

Senator **Murkowski**. Thank you, Senator Inouye.

I cannot help but note from your witness list here that it appears that no one is speaking in opposition to the bill. I have read the testimony of Ross Swimmer, who is, I assume, speaking for the Department of the Interior as opposed to the IRS. So I certainly commend you for the manner in which you have prevailed in the sense that the IRS was notified and they have chosen not to testify. I think that speaks for itself to some degree.

Might I ask, have they submitted extensive material for the record?

The **Chairman**. If the Senator will yield. I have documents, an exchange of letters, an exchange of memos, dating back to 1983 during the period when IRS, Department of Justice, did not concur with what we are doing today. Just for historical purposes, I am going to make this part of the record so we can look back to study the rationale for the opposition to the moved we are taking now.

Senator **Murkowski**. I think the points made by the witnesses and counsel particularly are to the historical background associated with the establishment of the reservations and the fact that these go far preceding the time that IRS established any policies or we had any regulations. It pretty much speaks for itself.

I would like to take advantage of the qualified witnesses here to pursue two questions very briefly. In view of the fact that in Alaska we have, on Annette Island, the Metlakatla Indians which came up from Prince Rupert. Father Duncan, their leader, brought them here. They were somewhat persecuted prior to the formalization of the British Columbian Government. They established themselves on Annette Island.

My question is a hypothetical one. But, what would be the procedure if an Indian himself owned a cannery, as opposed to the tribe owning a cannery or a sawmill? What would the tax situation be then? Anyone, I assume, can take a stab at this. Is there precedent set?

Mr. **Morisset**. As we understand it, sticking with fishing, if the cannery was 100 percent owned by a dully enrolled member of a federally recognized tribe, which the Metlakatla is—I also was counsel for Metlakatla at one time—that would be covered. As you know, Metlakatla does have a reservation status unlike most of the IRA organizations in Alaska.

Senator **Murkowski**. I am aware of that. So it is the opinion of counsel that it is covered under the same authority as the tribal aspect of it?

Mr. **Morisset**. That is correct. With the additional problem there Senator, as you know, that there is an envelope around the island which includes exclusive fishing rights.

Senator **Murkowski**. That is how far? Do you recall?

Mr **Morisset**. I cannot remember if it is 300 yards or half a mile or 3,000 feet. Something like that.

Senator **Murkowski**. Where non-members of the tribe cannot fish.

Mr. **Morisset**. I believe, as I recall it, it is an exclusive fishing area.

Senator **Murkowski**. That is correct.

Mr. MORISSET. It is more like a reservation fishing area than the issue that we normally deal with in which usual and accustomed places are in common with, as Senators Evans mentioned, other citizens throughout a very broad area. And the Metlakatlans, as I understand, also fish beyond that area.

Senator MURKOWSKI. That is correct. That was going to be my second question.

Mr. MORISSET. That is a different question. Fishing outside that area, as I recall, would not be pursuant to a treaty, Executive order or a Congressional act. That would be the inquiry. Is it pursuant to one of those three mechanisms or not? And to my recollection, it would not be.

Senator MURKOWSKI. When you say it would not be, let me take it back to make sure I understand your position. The Metlakatlan tribal effort to fish outside whatever the envelope is around the island, whether it be 3,000 yards or whatever, catching those fish and bringing them back and canning them at Annette Island Packing Company, or freezing them or whatever, does not constitute an income generated that would be theoretically subject to IRS?

Mr. MORISSET. That would be my understanding as currently drafted. Now, you should really ask them what their understanding would be.

Senator MURKOWSKI. I am sure that they would agree with that.

Mr. MORISSET. But we have dealt with the exercise of rights guaranteed by the Congress, either through an act or a treaty, or the executive branch through an Executive order. If it is some other fishing you are engaged in, such as the hypothetical that we were dealing with outside a U&A place, that is a different kind of problem.

Senator MURKOWSKI. It seems to me it would be covered under the historical area because they obviously historically fished beyond this envelope.

Mr. MORISSET. That is right. This is somewhat a different analysis than we normally do because we know where we are talking about. It has been determined by the courts, the geographical component.

Senator MURKOWSKI. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

I have one further question. Subsection (b) of this bill says the following, "The provisions of this act shall apply to any period for which the statute of limitations or any other bar to assessing tax has not expired."

Do you believe that this language is sufficient to resolve all of the pending cases that the IRS has brought against treaty fishermen?

Mr. MORISSET. I am not sure that as a strict technical legal matter it does. That is something that I would want to discuss further with staff. I think it is clear that that is the intent of the framers of this legislation. Certainly it would be our understanding.

But as I am sure you know, the whole question of the statute of limitations and retroactivity can become very bizarre and overly technical. I would want to be sure that this language could do it. I am just not sure at this point.

The CHAIRMAN. So finally just a clarification. This bill provides special benefits of tax exemption to enrolled members of federally recognized tribes.

Mr. MORISSET. That is correct.

The CHAIRMAN. If you are not a duly enrolled member you are not covered.

Mr. MORISSET. That is correct.

The CHAIRMAN. If fishing is done on a fishing vessel, that fishing vessel must be owned by either a duly enrolled member of a federally recognized tribe or that tribe itself.

Mr. MORISSET. That is correct.

The CHAIRMAN. What about partial ownership?

Mr. MORISSET. As I said in response to an earlier question, I am not quite sure about that because I do think we have some tribal members that are in the process of buying boats from non-Indians and would not own 100 percent yet. But it is clearly their boat, licensed to them, the fish are reported as Indian-caught fish, and so on. And we would certainly want to encourage them to continue to try to buy those boats.

I do not know if you know, Senator, there was a federally financed buy-back program to reduce the size of the non-Indian fleet in the State of Washington, and the State of Oregon. The Federal Government and people like me have encouraged the Indians to buy those boats, to build up their fleet at the same time reducing the non-Indian fleet.

So you would not want to get caught in a technicality that someone in the process of buying a boat was not covered. You might want to look at that more carefully.

Senator EVANS. Mr. Chairman, would the clarification of that be on which side of the 50 percent the fish caught were allocated? If they were allocated as Indian fish, would that not in itself be the clear determination?

Mr. MORISSET. If the master of the boat has what we call a Boldt I.D. number—the court has said everybody has to have a number—and he reports the fish caught under that number, they are going to be Indian fish under the decision, considered a treaty activity, and the specifics of how the boat is actually owned at that point become less relevant.

Senator EVANS. It would seem to me that that would be a fairly clear distinction and determination as to whether or not these would be taxable or not taxable.

Mr. JAMES. I would like to talk to the last section. I think in regard to the Lummi Indian Tribe, we are very concerned as to what the intent of this bill is. We do have a written statement with regard to that, but we would like to address that.

It is our understanding that the purpose of the S. 727 is to clarify that it is not now and never has been the intention of the Congress to apply the Federal tax laws to any income derived from the commercial harvest of fish resources reserved by treaty, Executive order or Federal statute, for Indian tribes and enrolled tribal members.

In regard to the applicability of the language, we believe that it should be pointed out, and we pray and hope that it will be in fact the determination of this committee, that this law applies to all the cases that have been processed in the Pacific Northwest and as well pending.

As you know, there are already some cases that have already gone through the courts. We are afraid that just because the issue is now being addressed by the Congressional committees and hopefully passed by the Congress, that it might not, in the eyes of the IRS, apply to those tribal members that have been unfortunate enough to have been the first ones targeted by the IRS and processed through their court.

So we would like to see the law applied retroactively. With regard to the question of who is exempt, we believe enrolled tribal members and the tribe is exempt. We do not think that if there is a non-Indian that owns the boat or is financing the boat or is working with someone to finance a boat for an Indian that that person should enjoy the benefits of the exemption.

The exemption goes with the right. It is a question that we have been very concerned about and want settled as to who has a treaty right or the rights guaranteed by Executive order or Federal statute. It is the enrolled tribal member and the tribe that has the right.

Senator EVANS. Mr. Chairman, let me pursue that just a little bit further. Mason, if a tribal member were to be buying a boat from a non-Indian and in essence had a mortgage or was agreeing to pay the non-Indian owner of that boat a necessary mortgage to eventually own it outright, would it be an accurate statement to say that the income earned by the tribal member in fishing would not be subject to income tax as long as the fish caught were under his ticket and declared as part of the Indian 50 percent?

And that further, whatever payment he made to a non-tribal member for the purchase of that boat, that income to the non-tribal member potentially would be taxed to the degree that he was making a profit on the sale of the boat?

Mr. MORISSET. That is exactly correct. That would be our understanding. That is going on right now. People are buying boats and have legitimate boat mortgages set up, fishing with them as a treaty Indian. And the non-Indian's payments are subject to whatever problems he has.

Senator EVANS. Mr. Chairman, I just have one other request. Mr. Morisset had half a dozen items on page 5 of his testimony where he said that, "We assume that this legislation includes the following concepts." You list half a dozen of them.

Would you work with our staff to ensure that if you feel that the language in the legislation is incomplete or does not clearly set forth in detail items that would cover these concerns, make some proposals for corrections in the legislation itself?

Mr. MORISSET. Yes; we would.

Senator EVANS. Either in legislation or suggestions for a committee report if the committee language would be sufficient.

Mr. MORISSET. The staff has already indicated an interest in these items.

The CHAIRMAN. Will the Senator yield at that point? With just one caveat. If the amendment covers the Internal Revenue Code, then the Committee on Finance will have every right to assume jurisdiction over this bill. Once that happens, we have lost control over it. I hope you will keep that in mind.

Mr. MORISSET. We understand that, Senator. We have been lectured very sternly by staff on that several times.

The CHAIRMAN. I thank you all for your participation this morning. It has been extremely helpful. It will help us to further clarify this measure. We have every intention to report this measure out expeditiously. So thank you very much.

The committee has in its files a memorandum for the Secretary of the Interior prepared by the Office of Legal Counsel of the Department of Justice, dated December 12, 1985. Also, a memorandum prepared by the Office of the Solicitor, Mr. William H. Coldiron, to the Assistant Secretary of Indian Affairs, dated September 21, 1983. These two documents will be made part of the record.

Also several letters from the Secretary of the Interior and members of the Department to various citizens of the United States.

[The above-mentioned correspondence appears in the appendix.]

The CHAIRMAN. Our next witness is the distinguished Assistant Secretary on Indian Affairs of the Department of the Interior, Mr. Ross Swimmer. It is always a pleasure to have you before us, sir.

STATEMENT OF ROSS O. SWIMMER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. SWIMMER. Thank you, Mr. Chairman.

Mr. Chairman and Senator Evans, it is a pleasure for me to be here and present to you the administration's position on S. 727. I have a prepared statement that I would like to have submitted for the record.

The CHAIRMAN. Without objection, so ordered.

Mr. SWIMMER. I would like then to make just a few brief comments on it.

This has been a point of controversy long before I joined the Interior Department. There have been attempts in the past to reconcile this issue administratively within the Federal Government. Unfortunately, those attempts have not been successful.

There have been honest legal disputes between different departments of the Government as to the taxability of this treaty fishing income. When I came into the Department it was my opinion that this kind of income had a long history of being exempt from income tax. In reviewing the information presented to me at the time it was apparent that while there were some technicalities perhaps that were being presented that indicated an exemption was not specifically stated in the statute, that it should in fact be treated as most other treaty income to individual Indians as it has been in the past.

In discussing this with the IRS, Treasury Department, my predecessors, as well as previous Secretaries of Interior, we came to the conclusion that in fact the best solution is a legislative amendment regarding the 25 U.S.C. section 71 that would make it clear that had there been an IRS code at the time this treaty was passed that the treaty right would not have been diminished by an imposition of an income tax.

I believe, in fact, that the Treasury folks or IRS, in prosecuting the cases, have even stated to the Court that the proper remedy in a case like this would be legislation to clarify it. I can understand the IRS' reluctance to perhaps allow such an income not to be taxed when there is not an overt specific exemption in the code, for fear perhaps that in other non-Indian cases it might be used as a toehold.

But certainly I think the intent was there when this treaty was signed. There was a bargain struck. The parties were to receive full value for the income derived from this benefit conferred by the treaty in exchange for what had been given. That we certainly would support that that confirmation be made now by enactment of the amendment as provided by S. 727.

I do speak for the administration on this issue. We are supportive of it. We are pleased that this has been taken up by this committee in a very timely manner. We will be glad to work with this committee, and of course those in the House, as we move forward on this issue to try to get it passed as expeditiously as possible so that the prosecution of the cases can be stopped and the real value of the treaty fishing right be realized by these tribes and individual fishermen.

[Prepared statement of Mr. Swimmer appears in the appendix.]

The CHAIRMAN. Thank you very much, Mr. Secretary.

This may sound redundant, but in speaking on behalf of the administration you were speaking on behalf of the Department of Justice, the Department of the Interior, the Department of the Treasury, and all the other related agencies?

Mr. SWIMMER. Yes.

The CHAIRMAN. Mr. Secretary, in light of the position taken by the administration, would you be in favor of holding up the Government's tax collection efforts, put that in abeyance while we consider this bill?

Mr. SWIMMER. I would have to defer to the Treasury Department or IRS on that for fear of precedential setting in non-related cases. I do not know the standard procedure. Obviously if a bill is winding its way through Congress it is going to settle an issue that is under intensive litigation, it would seem to make sense that we could hold those in abeyance to see if the legislation is passed.

Unfortunately, I believe, as one of the witnesses testified to earlier, the summit litigation has been concluded, in a lower court anyway, as supporting the IRS' view in this case. So it may be their desire to proceed in anticipation that legislation will not pass.

I would certainly use my offices, to the extent I can, to encourage that delay. I think it makes sense that we wait because there is support for this position in the Administration. The litigation must be very expensive and costly, in fact I think far more than what might be realized in taxable income.

The CHAIRMAN. What this committee is seeking is not an unreasonable time period, about 1 year. I am confident that this select comittee will be reporting this measure out very shortly. I feel confident that the Congress will approve of our action and send this to the President easily within 1 year.

But as you pointed out, these tax cases are very costly. It would be so unnecessary to require members of the federally recognized

Indian tribes to incur such costs when a simple order to put these cases in abeyance would save them all these thousands of dollars.

So I am pleased with your offer of assistance. We look forward to working with you. If you feel that some action on the part of this committee or on the part of the Congress, say a sense of the Congress resolution, would be helpful, we would be very happy to do that, sir.

Mr. SWIMMER. Thank you.

The CHAIRMAN. Senator Evans.

Senator EVANS. Thank you, Mr. Chairman. You have asked the two important questions: whether this represents an administration rather than a Department of the Interior viewpoint, and the question on trying to hold in abeyance these cases.

I would like to congratulate you Mr. Swimmer, and people from the Department of the Interior in convincing other departments of the administration to hold off and for the first time, to my knowledge, create a unified position within the administration on this issue. You are to be commended for getting us this far.

It does seem to me that with that kind of support from the administration, with the positive testimony which has been produced here this morning, and frankly, in not finding any significant opposition cropping up, the chances, as the chairman points out, of prompt passage are pretty good.

It does seem to me that it make little sense to waste Federal money on pursuit of these cases during this interim period of time. Along that line I would like to ask, since the Department of Justice as I understand it has decided not to represent Indian fishermen in these tax cases, how has the Department of the Interior fulfilled its trust responsibilities in this situation? Do you provide, from your sources of funds, help to those tribal members who are being subjected to these cases? And if so, are those funds sufficient to provide attorney's fees for those tribal members?

Mr. SWIMMER. I do not have the full data on that. Generally, where there is a tribal matter involved and the Department of Justice chooses not to represent, we are able to furnish support. I know that we are doing that in some cases here. I do not know the extent of that unfortunately, or how much is going to the individual Indian.

We have provided some legal reimbursement cost reimbursement to the tribes in this case, and will continue to do so.

Senator EVANS. It would be helpful for the record if you could provide for us some detail of that, especially including any estimate of the total amounts of money coming from the Department of the Interior that are required to defend these tribal members. From that we can probably come up with a pretty good measure of how much it is costing the Justice Department to spend prosecuting them on the other side.

It seems to me we are getting into a ludicrous situation where the U.S. taxpayers are paying for both sides of the argument. And collectively, I am confident that the costs are far greater than any expected revenue to be achieved from taxes collected. So it would be very helpful to get at least your half of how much has been spent to date, and perhaps some estimate of what future requirements might be on the Department if these cases were to proceed to conclusion.

Mr. SWIMMER. We will be happy to furnish that. One could imagine, if there are so many cases in one state of litigation or another that the cost would be in the hundreds of thousands.

Senator EVANS. Thank you.

The CHAIRMAN. Mr. Secretary, I would like to join my colleague in thanking you for the support you have given this measure. I think the record should show that from the very outset when Mr. Swimmer took office, he has been a leader in the quest to clarify Indian treaties.

Mr. Secretary, I am aware that in the past you have been subjected to much criticism from members of Indian tribes. I hope that members of Indian tribes will recognize your contribution in this area and come forth with praise instead of criticism.

Mr. SWIMMER. It is part of the job, Senator. But it has been enjoyable and it certainly is good when you can see a situation like this that needs correcting. I am pleased to be able to be here today.

[Material to be supplied by Mr. Swimmer appears in the appendix.]

The CHAIRMAN. I thank you very much, sir.

Our last panel, on legal and policy implications of this measure, includes, Mr. Harry Sachse, Esq., of Sonosky, Chambers & Sachse, of Washington, DC, and Mr. Charles Hobbs of Hobbs, Strauss, Dean & Wilder, of Washington, DC.

Gentlemen, welcome.

STATEMENT OF HARRY R. SACHSE, ATTORNEY, SONOSKY, CHAMBERS & SACHSE

Mr. SACHSE. Thank you, Mr. Chairman.

Mr. CHAIRMAN. Mr. Hobbs and I were both asked by your committee to address the committee on some of the legal and policy implications of the legal battle that has been going on concerning taxation of Indian fishing. I am not here representing any client, though I do in my usual course of practice represent a number of Indian tribes.

I was an assistant to the Solicitor General of the United States for 6 years under Solicitor General Griswold and Solicitor General Bork. And in that capacity I argued eight cases in the Supreme Court that dealt with Indian rights, including one of the cases that Billy Frank was talking about earlier.

One of the things that becomes clear after a while when dealing with Indian rights is that Indian treaties followed a set pattern. They were almost like form contracts. In the first part of the treaty the tribe gave up all their rights usually to hundreds of thousands of acres of land, sometimes half of a State.

In the second part of the treaty the tribe reserved to itself some small area of land that then became its reservation, because the tribe had reserved it. And in many treaties, including the treaties on the northwest coast, tribes also reserved something outside of that area of land. On the northewest coast it was their right to fish in their usual and accustomed stations. So that also is a reservation by the tribes.

When the States have tried to regulate tribal activities or tax tribal activities the Federal Government has come in very strongly on the side of the Indians. And as an assistant to the Solicitor General, that was my job. I usually was fighting against the representatives of the State who were trying to tax or to regulate various Indian tribal activities.

I should say this too, that the principle as to State taxation is that a State has to show a specific delegation from Congress to be able to tax Indian income. The State has to point to what act of Congress specifically gives it this right.

What has become an enormous irony is that when the Federal Government, which is the protector of the Indians, decides that it wants to tax an Indian or Indian tribe, the law has got set up in such a way that the tribe has to find a specific thing that says the Federal Government cannot do it. And that creates the search in treaties and in statutes for some particular language.

The irony of that has been brought out very clearly by Senator Evans, Senator Bradley, and others, that at the time these treaties were passed the Federal Government never intended to tax Indians, had no apparatus to do it, and the whole idea of the Federal Government taxing Indians is something of the last 20 or 30 years.

People like Billy Frank who have grown up with Indian activities, fishing and so forth, always had it firmly in their mind that the Federal Government simply does not tax such activities. This is something new, for the Federal Government to be marching in and trying to do it.

This has led to a lot of conflict within the Government which you have seen played out before you here. When I was in the Solicitor General's office we actually had situations where we filed briefs with the IRS' views on the first number of pages followed by contrary views by the Department of the Interior. That was called a split brief. It was done for a number of years under direction from the White House.

The issue of Federal taxation of Indian fishing was first sent to the Office of Legal Counsel in the Justice Department to resolve the dispute within the Government. The Office of Legal Counsel almost never deals with Indian issues. So here is a group of people who are bright lawyers but who rarely deal with Indian issues trying to resolve this issue. And I am just delighted that the Office of Legal Counsel apparently got overridden here and that the Federal Government came out on the right side.

Even with the Federal Government on the right side, legislation is absolutely needed because the basic law is so unclear that it has created the mess that the Government is in. And the questions of law is only, what is the intent of Congress? What is the intent of Congress in the treaty? What is the intent of Congress as to this kind of taxation? So I think it is entirely appropriate that Congress speak and end this dispute, which is what this committee is trying to achieve.

The leading Indian tax case in this century is probably the case of *Squire* v. *Capoeman*. In that case the Supreme Court held against the IRS—said it could not impose capital gains taxes on an Indian allottee's sale of timber from his land. It found vague language in the Allotment Act to be sufficient to establish the tax immunity. The Allotment Act did not say tax immunity. It said that at the end of the allotment period the land has to be returned to the Indian free and clear of any liens and incumbrances. The Court used that language to create the tax immunity.

But in doing that it said that it should not be presumed that the guardian intends to tax his ward, which is really the issue here again. And the Court also said that, "We agree with the Government that Indians are citizens and that in ordinarly affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens. We also agree that, to be valid, exemptions to tax laws should be clearly expressed. But we cannot agree that taxability of respondents in these circumstances is unaffected by the treaty, the trust patent or the Allotment Act." This was the Supreme Court.

What has happened since the *Squire* case is that the lawyers have begun to phrase all of this language in a way that only lawyers can. You have a situation where an individual on an Indian reservation who has an allotment does not pay Federal income taxes on the income he produces by farming from that allotment. That is considered income directly produced by the allotment. And under *Squire* v. *Capoeman.* the Allotment Act was held to create tax immunity.

His next door neighbor who did not get an allotment, another Indian from a federally recognized tribe from the same reservation who did not get an allotment, but who the tribe, whose land ought to be the best protected of all, has assigned 40 acres to for him to farm, that Indian has to pay income tax on the income that he gets from that farmland. This is the way the revenue rulings and the courts have worked this out.

Additionally, if the income is from farming or raising cattle it is immune. If the person uses his land to run a filling station or grocery store, it is taxable. In this distinction the IRS and the courts are dealing with what income is directly derived from the land which is all based on the language in *Squire* v. *Capoeman.*

It is an absolutely ridiculous set of laws and regulations. It really needs some broad attention. S. 727, this bill, does not correct all of those problems but it does correct a very important one, and one that there seems to be almost unanimity about. And that is the income from fishing activities, which is a quintessential treaty protected activity.

I do have one technical suggestion that I think Mason has already mentioned in the bill that you have, without talking about any real changes to the bill. And that is that for many years Indian rights were established by treaty. When Congress passed the law, the very law you are amending here, saying no more treaties with the Indians, agreements were still made with the Indians in the same way, the exact same form, where Indians gave up everything in the first paragraph, reserved what they were going to reserve in the second paragraph, set up the special conditions in the paragraphs after that.

But they were enacted by Congress. So they became acts of Congress. Later, Executive orders were used. So anything preserving Indian rights now—whether concerning water rights or anything else—usually states that it preserves the rights established by treaty, act of Congress or Executive order. S. 727 refers to treaty or Executive order, skipping right over acts of Congress. There is no sense in that. That should just be corrected.

Thank you very much.

[Prepared statement of Mr. Sachse appears in the appendix.]

The CHAIRMAN. I can assure you that that oversight will be corrected.

Mr. Hobbs.

STATEMENT OF CHARLES HOBBS, ATTORNEY, HOBBS, STRAUSS, DEAN & WILDER

Mr. HOBBS. Mr. Chairman.

I am Charles Hobbs. I am with the law firm of Hobbs, Strauss, Dean & Wilder. Our practice is Indian law.

Mr. Sachse mentioned the *Squire* v. *Capoeman* case. That is the leading case that is relevant to the question that is in the bill today.

My first job as a lawyer after I finished my clerkship was with John Cragun, who had just won the *Squire* v. *Capoeman* case. Since then I guess I have litigated a dozen tax cases, usually against the Federal tax collectors, but sometimes against the State tax collector. I am less than proud to say that I have only won about half of them. The tax collector if a very difficult person to beat, as the Lummis well know. And as I well know.

I am here today mainly to answer questions, not to make a set speech. But I would like to make a couple of points first. Just generally observing, this bill represents one of the points of friction between Indian tribes which still have, and always will, their own identity and traditions on the one had and there own government structure too, versus the United States on the other hand.

It is almost really a government-to-government conflict in the fringe where the two areas overlap. In many ways Indians have become full-fledged citizens of the United States. And with respect to taxes, they do pay taxes just like anybody else on their wages, on their interest from the savings and loans account, and so forth.

Indians, unlike the rest of us, have certain traditional properties and activities which they exercised and owned before the white man came. When it comes to those properties and activities there is a special case to be made that they ought not to be subject to the same tax burdens as those that white people are used to.

This is such a case. Indians, certainly in the northwest, have traditionally relied on fishing. To the northwest Indians fishing was so important that without exception, at least as far as I know without exception, every tribe that ceded its land insisted that it be spelled out in the treaty that they were going to be able to continue to fish outside the reservation. That is the way they got their food. If that was not to be allowed there might not have been a cession.

It was a fundamental part of the quid pro quo when these treaties were made that they be allowed to continue fishing, without interference, outside the reservation. True, they had to give up half of that to the incoming white people. But that was the only concession. And the question is whether that is something that ought to be taxed as if it were wages or something like that.

The bill says no. And our clients, and particularly the Metlakatla Tribe of Alaska, which is a tribe that relies very heavily on fishing, both without and within the 3,000 foot boundary line which would be protected under this bill, very much supports this bill. And on their behalf also I would like to echo what Mr. Sachse said, that the bill speaks of two of the usual three sources of rights. Namely, treaties and Executive orders. The third leg of the stool, which is almost always seen together with the other two, is statutes.

So I can understand why the bill reads the way it does. It wanted to track as much as possible the 1871 Act. But I do not see any problem. I think it can be worked out to make what to me is a very logical addition, the third leg of the stool, which is statutes.

The Metalakatla's rights come from statutes, not from treaties. They do have an Executive order and they might be saved by that fact. But their primary reservation comes from statute.

That concludes my prepared remarks. I would be pleased, along with Mr. Sachse, to answer any questions that the committee might have.

The CHAIRMAN. I thank you very much, gentlemen.

Throughout the discussions this morning I have heard this one phrase: duly enrolled member of a federally recognized tribe. Does this bill as written, with the clarification of putting in by statute, not just by Executive order or by treaty, but also by statute, would this grant treaty benefits to Eskimos or Aleuts?

I can see the extension of rights to the duly enrolled members of the Metalakatla Indian community. But would it grant the same treaty tax exemption rights to Eskimos or Aleuts who fish?

Mr. HOBBS. That is a very good question, Mr. Chairman. We do not have authority to speak for Eskimos or Aleuts, although we do represent some. Obviously those who live on water regard fishing as very important.

The United States historically, at least in my career, has always treated Eskimos and Aleuts in much the same way as Indians. But it is also a fact, as far as I know, that no Eskimo or Aleut group had any treaty. But most of them, if not all, that I know of, do have at least Executive order protection. I am not sure if the Executive order extends in a way that would make this bill attach to it. I simply have not studied that question. Perhaps Mr. Sachse has an opinion.

The CHAIRMAN. Mr. Sachse.

Mr. SACHSE. My only opinion is that there will be lack of clarity about that if the bill goes through as it is. There will probably be a lot of lawsuits about it. Going back to the fact that this is the Congress of the United States and not a court, and you do not have to look at the technicalities of what the courts have done but what you think is good policy for the United States, it would certainly make sense to extend the same kind of rights to other native people.

Whether you want to go that far or want to leave this as something that will be battled out in the courts is a legislative judgment that you have to make. For instance, the people of the Pribilof Islands are fishermen. And I cannot think of any policy reason why, because of their history, which was as hard as anyone's, they should not have this same right even though they might not have a statute or an Executive order that provides for it.

The CHAIRMAN. This measure, according to the first panel and according to your interpretation will not extend treaty tax exemption benefits to non-enrolled Indians. Is that correct?

Mr. SACHSE. That is correct. That is the way I understand it. I think what the tribes that you have heard are trying to achieve there is that there are people who are not members of their tribe because of either not enough Indian blood or being part of some group who are Indians but who have not been recognized by the Secretary of the Interior. The tribes who are recognized want to restrict this right to people who have been recognized by the Secretary of the Interior. I think they correctly feel that if it were opened up broader than that you would then have a whole lot of fights about who is an Indian. Whereas with registered members of federally recognized tribes, you are not going to have any problems about who is covered.

The CHAIRMAN. We have in the statutes the Alaska Native Claims Settlement Act. This Act identifies and provides definitions of beneficiaries. Most of us look upon this measure as a measure to provide income from oil.

I believe it also provides coverage of other rights, such as hunting and fishing. As one member of this committee I personally feel that this measure should make it clear that Eskimos and Aleuts should be covered, especially with the enactment of the Alaska Native Claims Settlement Act.

Can you assist the committee in drafting appropriate language to make certain that in addition to the duly enrolled members of federally recognized tribes we include Alaskans and Aleuts who are covered under the Alaska Native Claims Settlement Act?

Mr. SACHSE. I would be happy to do that. I should say too that we do represent a number of villages in Alaska and one of the Aleut communities there. So we are familiar with this situation. We would be happy to give you language that would achieve what you are hoping to achieve.

The CHAIRMAN. I asked a question on the statute of limitations. There is a phrase in here, "Provisions of this Act shall apply to any period for which the statute of limitations or any other bar for assessing tax has not expired." My question is, is this language sufficient to resolve all of the pending cases that the IRS has brought against treaty fishermen?

Mr. SACHSE. I think it is. And I think it particularly is if this legislative record makes clear, and I think it does, that that is the intent of Congress. I cannot think of any reason to use that particular phraseology except to say that any claim that is alive, any claim that the IRS has that is not barred by the statute of limitations, this act applies to.

Mr. HOBBS. I concur with that, Mr. Chairman.

The CHAIRMAN. What about those duly enrolled members of federally recognized tribes who by action of the Internal Revenue Service had to pay taxes up until this moment. Should they receive reimbursement of such amounts?

Mr. SACHSE. It certainly seems right that they should. This is a new policy of the IRS. It is not something, as far as I know, that goes back 20 or 30 or 40 years of something. I think we are talking about activities in the last 5 or 10 years. If I were an Indian who had paid these taxes, I think I would feel pretty bad that I was not going to be able to get reimbursement.

The CHAIRMAN. Would this measure be broad enough to provide that right to these Indians, to seek reimbursement? Or should we have specific language?

Mr. SACHSE. I think that if it is clear that the intent of Congress is that there should be such reimbursement, that that is what the law is here. And that certainly is a reasonable interpretation of the language going back to anything not barred by the statute of limitations. You can always make these things clearer with a statement in the committee report that flushes out what is intended.

The CHAIRMAN. That is about all we can do because if we try to amend the Internal Revenue Code providing for reimbursement, then an other committee gets hold of this, and who knows, it might never be acted upon.

Mr. HOBBS. Mr. Chairman, I might add that if this interpretation were followed, and that is an interpretation I personally would support on behalf of my clients, the liability of the Treasury to make refunds would be limited to 3 years because apparently this statute would not give a right, even an arguable right, to a refund barred by the statute of limitations.

The CHAIRMAN. Will you assist us in drafting the appropriate language to make sure that all these enrolled members of federally recognized tribes have all of their rights protected?

Mr. HOBBS. We will work closely with your staff, Mr. Chairman.

The CHAIRMAN. Before, during and after the consideration of this legislation.

Mr. HOBBS. We will do so.

The CHAIRMAN. I thank you very much.

Senator Evans.

Senator EVANS. Thank you very much, Mr. Chairman.

First let me thank both of you for appearing as years ago, in the engineering and private practice, I know how valuable each hour is for those who are professionals. Your willingness to appear here on a pro bono basis is deeply appreciated. You have some expertise that few others have and it is very helpful to the committee to have you here and to have you participate. Thank you both for that.

Mr. HOBBS. Thank you, sir.

Senator EVANS. First Mr. Sachse, what is your opinion of the bifurcation concept that we utilized for a time and then apparently abolished? Is that generally do you think a good idea for the administration, or should they get their act together and knock whatever heads there are and come out with a unified administration position when you get into circumstances like this?

Mr. SACHSE. I think an honest answer is that I think it is a good procedure when it comes out the way you want it to come out and a bad procedure when it comes out the other way.

I think in the Indian context it is a good procedure because the Department of the Interior has a viewpoint and an expertise that ought to be expressed. And you often have other departments that have a different and really conflicting role.

Taxation is one such example. You also get this in some of the environmental protection measures. And I am sure there are others. I could imagine the Department of Defense on some contract having a different view.

Indian tribes then risk that if there is going to be a single governmental view that the tribe simply does not get represented because there is some more powerful department in Government. So I think in Indian issues it is a good safeguard to let the Department of the Interior express its views in briefs in the courts, even if some other department is taking an opposite view.

There was another measure advocated at one time which was to set up a thing called the Indian Trust Council that would be a separate administration for stating Indian views, and the Department of Justice would not have any role in that. I do not think that was a good idea, and I think by the time it had been bandied around for a while it did not have much support.

Basically what a tribe needs, if it can get it, is the Justice Department fighting on its side because that is a strong arm on your side. In the case of where there is a split between Justice and the Interior, then a separate statement by Interior is also very helpful.

Senator EVANS. In this case the way it turned out, we are probably pretty lucky that we do not have a bifurcated situation.

One other question. Maybe it is too difficult or too fundamental a question to easily answer. But I am trying to get to the distinction between what might be taxable and what might not be taxable. And now speaking of the kinds of enterprise that might be carried on by tribal members on reservation land.

In your view, is there any distinction between those elements which are clearly mentioned in or comtemplated in the treaties themselves and those enterprises which were not contemplated or not mentioned? For instance, for our northwest tribes the general series of treaties in virtually every case mentioned fishing in a very specific way. And it is quite clear that fishing enterprises are clearly subject to treaty requirements and the kind of things we are trying to get at here.

How about the same tribe engaging in an enterprise that manufactures computer chips? In Indian owned, Indian run, Indian employees on their reservation. Is that enterprise taxable or not?

Mr. SACHSE. That is a difficult question. But of course, you deal with difficult questions. I would start with the proposition that it is not, that if it is run by a tribe on its reservation making use of its reservation facilities in the way that makes the most sense now, that that should not be subject to Federal income tax.

If a situation arose in which it was producing such income that as some national policy it was felt that it ought to be taxed, then there ought to be a specific act that would deal with it. But I do not think that tribal enterprises ought to be just swept into Federal income tax.

I think it is particularly important now because tribes are trying very hard to do what the Federal Government very much wants them to do. And that is to pull themselves out of poverty and pull themselves out of dependence on Federal checks. And it is slow progress. There are a few tribes with some good tribal enterprises. They hire a lot of people, they make employment, and so forth. We certainly would not want to see that kind of income become taxable. So far as I know it never has been taxed.

I think it makes no difference what activity that is. I am talking about a tribal activity.

Senator EVANS. So am I.

Mr. SACHSE. You have a slightly more difficult question when you are talking about an individual activity. But my preference is to stick to the principle that activities of Indians on their Indian reservations or off the reservation specifically guaranteed by treaty are not subject to Federal income tax unless there is a specific act that extends the tax to them.

I know that is the reverse of what the Supreme Court said, to some extent, in the *Capoeman* decision where they are looking for specific exemptions. But I really do think that that is an accurate policy.

Senator EVANS. Mr. Hobbs, what about your comment on that?

Mr. HOBBS. I can add a couple of comments to Harry's.

For one thing, the IRS has voluntarily pursued, since the beginning, the policy of not taxing tribes. It takes the position, and I have researched this back to the beginning, it has taken the position in published opinions that a tribe is not a taxable entity. But it gave no reasons for that. And the knowledgeable lawyers know that they could change that policy tomorrow. There is no statute exempting tribes from income tax. You may be surprised to hear that.

You may be aware that in 1982 the Tax Status Act extended all sorts of tax provisions, beneficial tax provisions, to tribes that States have. They did not extend the provision that States have—and counties and cities—of not paying tax on income that is derived from governmental activities. Tribes do not have that exemption by statute.

There is a gaping hole in the law, and if the IRS ever changes its policy to tax something as you have just described, that question may come back to this committee.

Turning to individuals, my most recent encounter with the courts happens to have been over the question of individuals

An Indian was running a motel on her allotment. She first claimed all of her income was exempt. That was denied. But then she said that at least the income from my land is exempt. My land is tax free, so the income ought to be tax free, from the *Capoeman* decision. No sir. The courts would not give her that either.

So I cannot call that a loophole in the law. But I can call it an anomaly, one that in my opinion ought to be corrected someday. An Indian who has land that cannot be taxed directly ought not to have to pay income that he has earned attributable to that land. In your case of making computer chips on his land, at least he ought to be able to exempt the land portion of his income, usually the lease value. That has been rejected by the courts.

Senator EVANS. Let me pursue it only on step further. I do have a much clearer picture of the complexity that we are dealing with.

Would there be a distinction, in your view, either of you, if it got to a point where there was sufficient income that a national policy was involved and a decision was made by Congress that that particular income ought to be taxed, that under current statutes for the most part that may be a legal thing for Congress to do.

On the other hand, if the decision were so try to tax what might someday be rather substantial income from the direct exercise of treaty specified fishing rights, can we by statute through Congress modify what appears to be at least a treaty right? It seems to me there may be a distinction between those things which are specifically guaranteed by treaty and those things which are not mentioned or contemplated by treaty.

Mr. **Hobbs**. Welcome to the world of Indian law. It so happens that Congress has the very clear power to abrogate any Indian treaty it pleases to.

Senator **Evans**. We probably have the right to abrogate any treaty we sign. The question is whether that is legitimate to do.

Mr. **Hobbs**. Right. And that would be the policy argument if such a proposal came before Congress. Suppose a treaty said, these Indians shall have the right to fish and that shall not be taxed. You could change that if you wanted to, but Congress has almost never made such a drastic change in a treaty. However, you could do it.

Senator **Evans**. We could do it, but normally in treaties between sovereign nations the modification—you can abrogate a treaty. Generally treaties have a certain method to extricate yourself from the treaty if you find that it is not to your benefit anymore.

You could persumably abrogate it, which is sort of a unilateral rejection of an agreement that you have entered into. But in order to modify a treaty you would have to have the acquiesence of both sides. Would you say that that, at least in a moral sense, is the same circumstance that exists in the treaties we have signed with the Indian tribes?

Mr. **Hobbs**. I think it is.

Mr. **Sachse**. That is clearly so. I want to raise, if I may in further answer——

Senator **Evans**. Because if we abrogate a treaty and just decide that we are not going to live up to it anymore, I presume that we could also reject any compensation or anything else. We just say look, we are bad guys and we are going to give it up. Normally, however, if a treaty is sought to be modified to the benefit of the United States, I would guess that at that point the other party to the treaty would seek something for themselves as well, otherwise it is a one-sided agreement.

Mr. **Hobbs**. The law does give Indians rights to compensation if the right that they had was a "vested right".

Mr. **Sachse**. I just wanted to add two concepts. One is that the question of whether Congress has the right to abrogate an Indian treaty is a question that has varied over time. I think until—somebody can probably remind me the name of the case. I want to say—what was the one that first held that——

Mr. **Hobbs**. The *Lone Wolf* case?

Mr. **Sachse**. *Lone Wolf* v. *Hitchcock*. Until *Lone Wolf* v. *Hitchcock,* which was somewhere around the 1890's, I think many people assumed Congress did not have the right to abrogate an Indian treaty. That this Nation had promised something and it had to be lived up to.

In *Lone Wolf* v. *Hitchcock* the Supreme Court said Congress could abrogate an Indian treaty and put it in terms of an exercise of the trust responsibility. In a case 5 or 6 years ago called *Delaware Tribe* v. *Weeks*, the Supreme Court began to look again at whether Congress really can just abrogate a treaty with the Indians or whether there is a violation of due process of law that limits Congress.

Clearly, Congress has to pay just compensation if it takes away a property right. So it is not such a yes or no to that question.

The other issue that I wanted to bring up is that in any treaty, or now with any Indian reservation, one of the things that has been promised to the tribe by the United States is that the reservation will remain the homeland for that tribe. And that is the concept that we describe as sovereignty. The tribe retains a limited sovereignty in that homeland.

And part of what any government needs is a tax base. So the tribe itself has to be able to tax. The Supreme Court has been recognizing that. There is a good argument to be made that revenues produced on an Indian reservation or from treaty protected rights should not be taxed by the United States or by the State at all. That revenue ought to be left as part of the tribe's tax base.

So that if someone in the tribe begins to make a lot of money—suppose a fisherman begins to make considerable amounts of money—the tribe can tax that. That becomes one of the only sources of revenue for a tribe. And tribes do that. They tax individuals who begin to make more money than others.

Senator EVANS. It is sort of the taxation version of double jeopardy.

Mr. SACHSE. An Indian businessman really has certain disadvantages because he has three levels of Government that he has to deal with.

Senator EVANS. Thank you, Mr. Chairman.

The CHAIRMAN. Gentlemen, I thank you very much. You have been extremely helpful.

I note the presence of the staff attorney for the Native American Rights Fund, Mr. Sockbeson.

Mr. Sockbeson, may I ask you a question?

STATEMENT OF HENRY SOCKBESON, ATTORNEY, NATIVE AMERICAN RIGHTS FUND

Mr. SOCKBESON. Certainly, Mr. Chairman.

The CHAIRMAN. Would you be in favor of extending the tax exemption rights to those Eskimos and Aleuts who are recognized as beneficiaries under the Alaska Native Claims Settlement Act?

Mr. SOCKBESON. Yes, Mr. Chairman; I believe they should be accorded that right. There is no real rational distinction between the two situations in this particular case. Many of the Alaskan villages do depend upon fishing. Up there it is quite often for subsistence. There are also Alaska Natives who do exercise their traditional rights up there by engaging in commercial fishing.

In my view there is no functional difference between them and the Lummi Tribe and other tribes that exercise fishing rights.

The CHAIRMAN. I did not want the committee to attempt to extend rights to someone if he did not want it.

Mr. SOCKBESON. I am sure they would have no objection to this extension.

The CHAIRMAN. I thank you very much.

I thank all of you for your participation this morning. It has been extremely helpful. The record will be kept open until 12 noon, Tuesday, April 7, 1987. If you wish to provide additional information or amend your testimony, please do so by 12 noon. Tuesday, April 7, 1987.

With that, this hearing is adjourned.

[Whereupon, at 12:15 p.m., the hearing on S. 727 was adjourned.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. BILL BRADLEY, U.S. SENATOR FROM NEW JERSEY

MR. CHAIRMAN, I am pleased to be able to testify at these hearings and I compliment you on your speedy consideration of this legislation. I note that it has been just two weeks since we introduced this legislation to clarify Indian treaty fishing rights.

Last year, I became involved with this issue when the plight of the Lummi Tribe came to my attention. The Lummi were rightfully upset when the IRS determined that fishing income would be taxable unless the treaty contained language specifically conferring income tax exemption.

This struck me as strange logic to apply to treaties that were negotiated as long ago as the 1850's -- over six decades before a federal income tax was even allowed by the Constitution. I am sure that had the Indian treaty negotiators known of the future existence of the IRS, they would have been more accomodating at the time.

Last spring, thirty-three U.S. Senators joined me in signing a letter telling the IRS and the Justice Department that the Indian claims are of substantial merit. These Senators were Republicans, Democrats, Easterners and Westerners. It was a broad-based group. We had the Administration's own Department of the Interior on our side. It was my hope then that the Justice Department might have listened to reason and seen the logic of the Indian position. They didn't. This legislation is designed to settle the issue once and for all.

As the 99th Congress drew to a close, I offered an amendment to the Debt Ceiling Bill. Senator Evans joined me in that effort, and the amendment was adopted unanimously. Unfortunately, the House refused to act on any amendment to the Bill, and these efforts were stalled.

We will not be stopped this Congress. In addition to the leadership of the Chairman and ranking member of the Select Committee of Indian Affairs, Senators DeConcini, Adams, and McCain have joined as cosponsors of this legislation. Again, the support is solid and broadly based.

The Department of Interior estimates that the tax revenue is small, roughly $70,000 per year. What is at stake, however, is much more substantial. The United States' policy of respect and support for treaties with American Indian Tribes is an international display of our nation's commitment to justice and human rights. American Indian treaties should not be subject to further erosion through unilateral reversals of long established principles.

I hope that early action by the Senate Indian Affairs Commitee and prompt actions by the full Senate, will settle this matter and reaffirm our commitment to honor the treaty with the Lummi Tribe.

PREPARED STATEMENT OF HON. DANIEL J. EVANS, U.S. SENATOR FROM WASHINGTON

Mr. Chairman, the bill we are hearing today will clarify Indian treaties and executive orders with respect to fishing rights. The bill achieves the same result as an amendment offered by myself and Senator Bradley and accepted by the full Senate on August 1, 1986, on the Debt Ceiling bill. For reasons unrelated to the merits of the amendment, however, it did not survive conference on the legislation.

Specifically, S. 727 will clarify that income derived from the exercise of fishing rights secured by Indian treaties and executive orders is not subject to taxation. The immediate result of this legislation will be to forestall attempts by the Internal Revenue Service to tax members of the Lummi tribe of Washington state for the exercise of their rights to fish secured by the Point Elliott Treaty of 1855. The long range result is to reaffirm our commitment to many Indian tribes to preserve their rights to fish commercially for salmon and steelhead, and to receive unencumbered the fruits of their labors.

For almost two years now Senator Bradley and I have attempted to convince the Justice Department and the Internal Revenue Service to change their position on this issue. Thus far, in spite of a number of favorable opinions of the Interior Department Solicitor, and the unwavering support of Interior secretaries Clark and Hodel, and Assistant Secretary Swimmer, IRS and Justice have refused to reconsider. Consequently, a legislative remedy is the only recourse short of many years of litigation.

I am dismayed by the complete and utter failure of the Internal Revenue service and the Department of Justice to honor the trust responsibilities of the Federal Government under the 1855 Treaty to Indian tribes whose members are fishermen. As I previously mentioned, the Solicitor of the Department of the Interior consistently has recognized that income from treaty fishing activities is not subject to taxation. Yet the Internal Revenue Service consistently has ignored the most fundamental canons of construction of Indian treaties to arrive at a seemingly predetermined result. We cannot, and will not, allow this issue to go unresolved.

Mr. Chairman, I am grateful for your support for this legislation and for the prompt attention you have given it. I am also gratified by the support of my colleagues Senators Bradley, Adams, DeConcini and McCain. I hope that the Committee will report this bill to the full Senate as soon as possible, and that the entire Congress will respond favorably to our efforts.

PREPARED STATEMENT OF HON. BROCK ADAMS, U.S. SENATOR FROM WASHINGTON

Mr. Chairman, I would like to thank you and the entire Committee for holding this hearing on this important piece of legislation. I would also like to thank my distinguished colleagues, Senator Evans and Senator Bradley, for their continued perseverance and leadership on this issue.

In 1855, the Point Elliot treaty guaranteed to the Lummi tribe the perpetual right to fish in their usual and accustomed places. This right has been confirmed many times by the Federal courts. It is a basic canon of the law of interpretation of Native American treaties that treaties be interpreted to mean what the tribes thought they meant when they signed them. This means that the tribal leaders who signed the Port Elliot treaty are generally thought to have understood they would be able to continue fishing and trading without, in any way, having to turn over to the Federal Government a portion of their catch. Imposition of federal income tax on exercise of these treaty fishing rights is the equivalent of stopping tribal fisherman when they they return to shore, and physically taking fish from their boats. As such, it represents a breach of Federal obligations under the treaty.

Unfortunately, the Federal government has made a bad situation worse by failing to fulfill its obligations under the Federal trust responsibility, and protect treaty fisherman from this attack on their rights. Even though the Department of Interior stated on more than one occasion that this IRS action was inconsistent with both federal law and the Administration's official policy of conducting a government to government relationship with Native American tribes, the Justice Department permitted the IRS to proceed. By doing so, furthermore, the Justice Department deprived tribal fisherman of federal legal representation because the Justice Department could not represent both the Department of the Interior and the Department of Treasury. This case raises an important issue - how does the federal government fulfill its trust responsibility when various branches of government disagree on policy affecting Native American tribes? I understand this issue will be explored in this hearing, and I commend the Committee for doing so. I look forward to working with you all to pass this legislation as soon as possible. Thank you.

PREPARED STATEMENT OF BILLY FRANK, JR.

As Chairman of the Northwest Indian Fisheries Commission, I appreciate the opportunity to present verbal and written testimony before this Committee representing the twenty Boldt Case Area Tribes of the Puget Sound and Washington coastal areas. The importance of S. 727 "to clarify Indian treaties and executive orders with respect to fishing rights" is obvious for our Tribal governments and their respective Tribal fishermen.

In the Pacific Northwest, fishing has been an integral element of our Tribal cultures and economies for many centuries. In the mid-1850's, Governor Stevens negotiated treaties with our forefathers whereby vast areas of land and natural resources of incalculable value were ceded to the United States in exchange for reservation lands, support provisions, and protection from non-Indian encroachments. We are a fishing people and each of our treaties:

Treaty of Medicine Creek, December 26, 1854
Treaty of Point Elliott, January 22, 1855
Treaty of Point No Point, January 26, 1855
Treaty of Neah Bay, January 31, 1855
Treaty of Olympia, July 1, 1855 and
  January 25, 1856

contained the language, "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the Territory...." This Tribally reserved treaty right was specifically mentioned in each treaty to ensure commercial, ceremonial, and subsistence fishing rights for our future generations.

The treaty-reserved fishing rights language and intent are indeed clear. Preserving and protecting our tribal fishing rights against non-Indian encroachment and diminishment has unfortunately been a continuing struggle for each succeeding Tribal generation. Seven times in this century we have defended our Tribal fishing rights in the Supreme Court. Five times in the last decade we have fought legislative attempts to diminish or extinguish our fishing rights. Environmental degradation, mismanagement of the salmon resource, and unregulated international interception of our salmon in this century further depleted this Tribal resource. And finally, the Internal Revenue Service arbitrarily decided in 1982 that Tribal fishermen's income, derived from commercially fishing in treaty-designated waters, is subject to Federal taxation.

We have successfully stopped and, in some cases, reversed these legal, legislative, and environmental onslaughts targeting our treaty rights and fisheries resources. Federal District Judge George Boldt in the 1974 landmark decision in U.S. v. Washington, reaffirmed Tribal treaty-protected fishing rights and interpreted the treaty language, "in common with," to mean share equally. This decision, which confirmed the treaty tribes rights to half of the harvestable salmon and steelhead returning to the usual and accustomed fishing grounds located off the reservations within the designated treaty areas, was upheld twice in the Supreme Court. Legislative attempts to abrogate our fishing rights were effectively halted. Cooperative Tribal initiatives in fisheries management and enhancement with Washington State as well as local commercial/recreational fisheries interests, have dramatically improved Indian/non-Indian relationships and focused our mutual attention on this renewable resource. Tribal participation has become integral to the fisheries management decision-making process at the state, regional, and international levels. The anadramous salmon resource is a mutual concern.

The Internal Revenue Service actions create new hardships, suspicions, and challenges for Tribal governments protecting their treaty fishing rights and resources. Tribal fishermen, licensed and managed by the respective Tribal governments, were just beginning to earn self-supporting livelihoods fishing in their usual and accustomed waters in the early 1980's. In many instances, Tribal governments tax the income of their commercial fishermen and reinvest the revenue into resource management and enhancement. The Reagan administration's White House Indian Policy of January 1983 promoted a "government-to-government" relationship between the United States and American Indian Tribes. IRS agents, after 130 years of a treaty relationship, have reached beyond the Tribal government jurisdiction and attempted to impose Federal taxes on Tribal fishermens' income derived from fish caught in usual and accustomed treaty-designated waters.

The Interior Department, serving as trustee for Tribal resources, has adamantly opposed the IRS actions as unlawful. In 1983, Interior Solicitor Coldiron stated in his legal opinion:

> "It is my opinion that fishermen who are members of tribes that have established treaty rights are exempt from federal income tax on fishing income earned pursuant to those treaties."

The Treasury Department Solicitors, of course, interpreted the law through the narrow view of tax policy.

The IRS legal position rests its case principally on a 1982 Tax Court decision, Earl v. Commissioner. In this case, an American Indian, not enrolled in an Indian Tribe serving as a cook on a non-Indian fishing boat, represented himself before the Tax Court with no attorney. As Interior Solicitor Coldiron observed in his 1983 opinion: "It could not be expected, of course, that the Tax Court, which normally does not interpret treaties, would have, on its own, any appreciable familiarity with the long and complex litigation involving the Stevens treaties." The IRS arrogantly continued its efforts against Tribal fishermen summoning them to tax court and levying assessments.

This intra-departmental dispute between the Interior and Treasury Departments continued into 1985. Interior Secretary Hodel in the attached February 22, 1985 appeal letter to Treasury Secretary Baker contended: "This issue has been examined and a conclusion reached that as a matter of law treaty fishing was tax exempt." Hodel attempted to resolve the issue "in a fashion that recognizes the special obligations of the United States to the Indian Tribes." The Treasury Department did not respond.

Interior Secretary Hodel wrote Attorney General Meese in the enclosed March 22, 1985 letter seeking a resolution of the Department's legal disagreement. Hodel included a March, 1983 response to the IRS by Interior Solicitor Richardson with his letter to Attorney General Meese. Richardson contended that the IRS opinion was based solely on tax law and did not consider treaty law. Richardson supported fully the previous Coldiron opinion and noted:

> This is not only a tax issue however; it is also an Indian treaty issue. There are two bodies of law which must be considered in relation to each other.

Two federal agencies with separate responsibilities for distinct elements of United States law were obviously at a stalemate.

The Justice Department in December, 1985, rendered its judgement that the IRS position was "the sounder view of the law." The Justice Department reasoning was that if Federal income tax exemption was not mentioned in the treaties, Tribal fishermen would be subject to Federal taxation.

Obviously, our forefathers in negotiating treaties with the United States, reserving the right to fish to their Tribes, never envisioned that the Untied States would have the right to impose taxes sometime in the distant future. The treaties were signed in the 1850's; the first Federal income tax laws were established in 1913. Basic canons of American Indian law are that the treaties are to be interpreted as the Indians understood them at the time. Federal taxation was simply not a concept of consideration. Why would the Tribes so explicitly reserve unto themselves fishing rights except that it was a principle sovereign right to a resource? And why would the United States observe that right for over 130 years and then suddenly reverse its legal posture through manipulated interpretation unless the right was emerging as having economic value? This Treasury/Justice Department initiative is a blatant attempt to diminish a Tribal resource and violate treaty rights under the guise of legal interpretations.

American Indian people pay Federal income taxes like everyone else. In fact, Tribal fishermen whose income is derived from commercial fishing outside their usual and accustomed fishing areas pay Federal taxes. This unprecedented attack on a Treaty-protected tribal resource is viewed by Tribal leaders as a calculated attempt to openly take tribal property. Although these government agents contend that the economic diminishment of a resource is not a diminishment of the treaty right, we contend that this Federal intrusion, circumventing Tribal governments to tax the income derived from a treaty-designated resource, is certainly violating our basic treaty rights.

Tribal governments own the treaty-protected resources and are the only legitimate government to impose taxes on Tribal member income generated from the resource harvest. Interior Secretary Hodel stated the basic issue quite succinctly in his letter to Attorney General Meese on this issue:

> "Diminution of the treaty fishing rights through the imposition of a tax not only represents an attack on the unique relationship existing between the United States and Stevens Treaty Tribes, but marks an abrupt departure from President Reagan's January 24, 1983, Indian Policy Statement which reaffirms the Federal Government's commitment to that relationship and to the trust responsibility involving Indian natural resources, and, which further, encourages the development of strong reservation economies."

Tribal treaty rights are not determined by IRS Agents or their Tax Courts. Treaties are determined between the Tribes and Congress.

The taxes that would be available to the IRS are estimated between $70,000 and $120,000 annually. The majority of Tribal fishermen, according to a 1981 survey of Lummi Tribal fishermen, earned $6000 to $10,000 as documented in the enclosed 3/22/85 letter from Interior Secretary Hodel. Since no Federal income taxes were applied to these fishermen in the past, records from catches are the only data available. The commercial fishing industry is known for the extensive expense due to equipment damage or loss. These normal tax deductions were not afforded tribal members brought to tax court due to insufficient records, however the tax assessments & penalties were based solely on income. This vindictive IRS approach has literally devastated fishermen and their capacity to earn a livelihood.

The Northwest Indian Fisheries Commission endorses the purpose and intentions of S. 727 as introduced and we are certainly encouraged by the expressed support of the Senate sponsors. We are concerned that the rather sweeping language of the legislation may expose Tribes and their fishermen to future IRS intervention through regulatory interpretations.

Our hope is that the Congressional legislation designed to stop these IRS treaty violations will clearly express Congressional intentions for the faceless bureaucracy either by statute or report language.

In conclusion, Tribal governments are becoming increasingly concerned and frustrated by the repeated attempts to control and reduce Tribal treaty-protected rights and resources. The arsenal of strategies designed to reduce or eliminate our treaties is amazing in its breadth, persistence, and inventiveness. We, as ancestors gone before and generations unborn, will effectively defend our rights and resources. We are deeply appreciative of those in Congress willing to help us.

Thank you.

PREPARED STATEMENT OF JEWEL JAMES

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THE ISSUE: AN UNJUST TAKING

For the past five years the Lummi Indian Tribe, of the Pacific Northwest, has been spending its own limited resources--with limited assistance from the Department of the Interior--to defend the Treaties against the actions of the Internal Revenue Service. Meanwhile, the head of the IRS Litigative Division spends his time trying to convince Tribal Chairmen, at their National Tribal Chairman's convention, that the IRS is "...only after the Lummis," and that this case does not apply to other Treaty resources. The Tribal Chairmen, of course, did not accept or believe his argument. NTCA, which represents 135 Indian Tribes nation-wide has officially opposed this "unjust taking through taxation." THE ISSUE IS THE ACTION OF THE IRS AND ITS ATTEMPT TO UNDERMINE THE TREATIES MADE BETWEEN THE UNITED STATES OF AMERICA AND AMERICAN INDIAN INDIGENOUS TRIBES. And, the fact that what applies to fish will be applied to the few resources that American Indian natives still own.

THE BEGINNINGS: THE NATIONAL TREATY PROTECTION TASK FORCE

Indian Tribes and their national organizations have taken official positions opposing the activities of the IRS. If the 'Service' is allowed to prevail in the Service's courts, then it will soon be the case that they will be able to take Treaty resources "through taxation" and thereby reduce the federal deficit--at the expense of the "poorest" people in America. The national coalition which has formed as a result of this issue is spearheaded by The Lummi Treaty Protection Task Force, coordinated by Jewell Praying Wolf James, The Task Force has spearheaded the national initiative to ensure that Tribes, tribal groups, non-Indian organizations, and other citizens concerned with the American democracy are well-informed about this case AND ITS IMPLICATIONS FOR EVERY CITIZEN--INDIAN AND NON-INDIAN--IN THIS LAND.

NON-INDIAN SUPPORT GROUPS (SEE TAB A)

International Community

While America at-large may be naive about this issue, the international community is not. A petition from the PARLIAMENT OF EUROPE was circulated and signed by over 20 Parliamentarians. The petition demands the United States honor its Treaty relationship with the American Indian. Other international organizations, such as INCOMINDIOS, THE WORLD COUNCIL OF INDIGENOUS PEOPLES, AND THE WORLD COUNCIL OF CHURCHES have echoed the demands of the European Parliament. Even in nations as far away as SOUTH AFRICA, leaders such as BISHOP TUTU and CHIEF BUTHELEZI have indicated support for the position of the Treaty Task Force. The UNITED NATIONS has been contacted through its offices in Geneva on several occasions; however, as funds for the NGO committees have been severely cut, written support was delayed. The IRS issue is scheduled for discussion at the THIRD EUROPEAN MEETING OF NORTH AMERICAN SUPPORT GROUPS, in Vienna, Austria. Finally, the Treaty Task Force has received support from the UNITED NATIONS ASSOCIATION in all four of the Association's key regions. (See Tab A: International Support)

Christian and Jewish Organizations

The Treaty Task force has also gained the support of religious organizations in the United States. These organizations include local, regional, national, and international organizations. These organizations have expressed their support of the Tribes and their dismay at the actions of the IRS. Among the religious organizations supporting the Treaty Task Force are: the FRIENDS COMMITTEE ON NATIONAL LEGISLATION, the CHURCH COUNCIL OF GREATER SEATTLE, THE ECUMENICAL MINISTRIES OF OREGON, THE NATIONAL INDIAN LUTHERAN BOARD, NATIONAL COUNCIL OF CHURCHES, THE NATIONAL CONFERENCE OF CHRISTIANS AND JEWS, THE ANGLICAN CHURCH, AND THE WORLD COUNCIL OF CHURCHES.

Concerned Citizen's Committee

The activities of the Treaty Task Force came to the attention of a number of prominent citizens, both in the United States and in Europe. These citizens, concerned with the relationship between the Tribes and the federal government, formed the Committee in the fall of 1986. The Committee includes representatives from the BUSINESS AND ACADEMIC COMMUNITY, INTERDENOMINATIONAL GROUPS, PUBLIC SERVICE INSTITUTIONS, AND INTERNATIONAL ORGANIZATIONS. It is their belief that the actions of the IRS are both arbitrary and unjust and represent a threat to the credibility of the United States not only in this country, but in the international arena, as well.

INDIAN SUPPORT GROUPS (SEE TAB B)

National Indian leaders are, of course, concerned that this issue will expose Indian Country to the last great United States rip-off of the American Indians. They believe this "case against the Lummis", as the IRS puts it, will have a domino effect and result in YET ANOTHER GRAND-SCALE THEFT PERPETRATED BY IRS AGENTS AND DISGUISED AS JUSTICE IN THE TAX COURTS. The Task Force has received support from Tribes and intertribal organizations across the United States. As their written comments and resolutions make clear, the Tribes are well aware of both the motive and consequences of the actions of the IRS and view both as unacceptable given the understanding expressed in the Treaties.

THE PREMISE AND THE PROMISE: SOVEREIGNTY AND THE TREATIES

The 2,500-member Lummi Tribe has a reservation located in northwestern Washington, just above the city of Bellingham, ten miles south of the Canadian border. Since time immemorial, the Lummis have harvested salmon and other fish from Washington's coastal waters. This fishing right was recognized and reserved in the Treaty of Point Elliott, made between the United States and the Lummi (as well as other area-Tribes) in 1855. On no less than seven separate occasions in this century, the U.S. Supreme Court has upheld the Treaty fishing rights of Washington Tribes, like the Lummi. Indians, like other Americans, DO, in fact, pay taxes on income earned off the reservation. However, Indian Tribes possess SOVEREIGN POWERS over their own internal affairs, including control over natural resources on tribal lands. Therefore, INCOME DERIVED FROM THESE RESOURCES HAS, IN THE PAST, BEEN EXEMPT FROM BOTH STATE AND FEDERAL TAXES.

THE GOVERNMENT'S TARGET: A TEST CASE

The Lummi Tribe contends that fishing resources have now been targeted, after 131 years, as a result of careful and deliberate planning by people within the Internal Revenue Service. The IRS, which does not act without approval of the Executive Branch, carefully selected a case that would, in their opinion, guarantee a victory in the Courts. This is now referred to as the Earl v. Commissioner case. The IRS found a man fishing as an employee on a NON-INDIAN FISHING BOAT. This individual (Roy Earl) WAS NOT A REGISTERED MEMBER OF THE PUYALLUP TRIBE OF INDIANS, local to that area. In addition, EARL DID NOT GET THE SERVICES OF AN ATTORNEY IN TAX COURT. The Court ruled, in this case, that "Treaty Indians must pay taxes." The IRS attorneys secured a cheap victory with immeasurable implications in the IRS Tax Court, unopposed by a reasonable defense for American Indians.

"VICTORY" IN THE COURT AND THE BEGINNING OF A SUFFERING

Immediately armed with this "victory" in their Court, the IRS moved to file SEVENTY claims against members of the Lummi Indian Tribe. The result is, THE ONLY SOURCE OF EMPLOYMENT--and THE TRADITIONAL MEANS OF LIVELIHOOD--IS BEING DESTROYED. The Lummis are losing their boats and homes. Furthermore, THE IRS RECENTLY TOLD SEVERAL TRIBAL MEMBERS THEY SHALL NOT BE ALLOWED DEDUCTIONS from what was declared as the amount owed, and that they MUST PAY ALL INTEREST AND PENALTIES. This may or may not seem important to America at-large, since they realize only a 7% unemployment rate, but the Lummi Indians suffer from a 90% UNEMPLOYMENT RATE EXCEPT DURING THE FISHING SEASON when the figure 'drops' to 65%. The Lummis have been battling for protection of their fishing rights since 1889, and now we learn that the POWER OF THE INTERNAL REVENUE SERVICE HAS BEEN TURNED ON THEM. The American Indian is now to experience what the Founding Fathers knew well: that is, THE POWER TO TAX IS THE POWER TO CONTROL AND DESTROY.

A CRISIS IN GOVERNMENT-TO-GOVERNMENT RELATIONS AND AN EMERGING CRISIS

Joseph DeLa Cruz, President of the Quinault Indian Nation, whose fishing rights are also vulnerable to the IRS action, asserts that this attack on Indian resources by the IRS "constitutes a direct violation of the Treaties between the United States and the American Indian Governments." The other Indian governments in the United States have joined in opposing this encroachment into the sphere of Indian sovereignty. Each of our Tribal governments stand prepared to both defend and protect the individual rights of our Tribal membership. The infringement by the IRS upon the Treaty-protected rights of our people is a direct assault on our rights. Mr. DeLa Cruz further stated:

> "We strongly urge the United States government to withdraw its administrative efforts to induce confrontation with our governments. We urge an immediate return of the long-standing policy of recognizing the sovereign status of our Treaty governments and Nations, and the right to our Treaty-protected resources."
>
> "We therefore insist that the U.S. government follow the January 24, 1983 Presidential Policy statement to Congress of a 'government-to-government' relationship with Indian Tribes."

This reference of Mr. DeLa Cruz to President Reagan's policy statement is best exemplified in the following excerpt:

> "When European colonial powers began to explore and colonize this land, they entered into Treaties with sovereign Indian nations. Our new Nation continued to make Treaties and to deal with Indian Tribes on a government-to-government basis. Throughout our history, despite periods of conflict and shifting national policies in Indian affairs, the government-to-government relationship between the United States and Indian Tribes has endured. The Constitution, the Treaties, laws, and court decisions HAVE CONSISTENTLY RECOGNIZED A UNIQUE POLITICAL RELATIONSHIP BETWEEN INDIAN TRIBES AND THE UNITED STATES WHICH THIS ADMINISTRATION PLEDGES TO UPHOLD." (Capitalization emphasis added)

Mr. Joseph Tallakson, President of SENSE, Inc., which represents the Tribes on the Treaty Task Force, has also observed that:

> "The United States has no right taxing Indian tribal members on income derived from Treaty designated resources. The United States obviously has stepped across the line of Tribal sovereignty in a planned political maneuver. This action was politically motivated and is clearly a political-jurisdictional issue. Resolving the dispute in U.S. Tax Court is simply playing by United States rules, entering a legal forum controlled and designed by the United States, and HOPING BY MERCY AND FORCE OF ARGUMENT THAT TRIBAL SOVEREIGN RIGHTS WOULD NOT BE DIMINISHED. The results of the Federal Court action may favor the Lummi after several years of litigation leading to the Supreme Court--or it may not."

Suzan Shown Harjo, Executive Director of the National Congress of American Indians, sent notices out to Indian Country that:

> "The NCAI opposes in the strongest possible terms the Administration's efforts to abrogate the Pacific Northwest Tribes' rights and

> to apply laws of general applicability to Treaty-protected resources. Carried to its logical extension, full application of this unique position could prove as devastating in Indian Country as the General Allotment Act of 1887, through which Indian nations and people lost some 100 million acres of territory."
>
> "We urge all to support the Treaty Tribes of the Pacific Northwest in their efforts to overturn the Administration's position, not only as it affects their immediate struggle, but as IT CARRIES IMPLICATIONS FOR ALL OF INDIAN COUNTRY and Federally-protected Indian and Native rights."

Ms. Harjo is well known, and is respected among the American Indian Tribes. Her statement before the Senate Select Committee on Indian Affairs (February 18, 1986) is indicative of why she is so popular with Tribal leadership. The following excerpt is taken directly from that testimony:

> "Indian and Native nations gave up a vast territory over to the United States government and from which its citizenry derives great benefit, in exchange for health and education and other socially beneficial programs and services, and in exchange for U.S. protection against encroachment by the States and people regarding our tangible and intangible rights and resources. These exchanges--some through Treaties, some through Acts of Congress, some through Executive Orders--were intended to stand in perpetuity. Yet, for example, the United States did not prohibit the theft of the sacred and gold-rich Black Hills from the Sioux nation and other Indian groups who value that area as a religious site. To date, THE UNITED STATES HAS NOT FULFILLED ITS PROMISES TO MAKE THE DESERTS BLOOM FOR INDIAN NATIONS who agreed to remove their people to arid reservation land. If these promises were upheld, as well as the overriding Constitutional guarantees that Indians

> would not be taxed, that Treaties would be the Supreme law of the land, Indian nations and peoples would be rich, rather than poor, today. If the Congress would have exercised its plenary power properly, as intended with regard to the limitative control of state involvement, rather than to benefit itself, its agents, its ranchers, its landbarons, its energy industries, and the Fortune 500 companies, Indian Native nations and people would not be in the dire circumstances of need, today."
>
> "Today, the Executive Branch is proceeding unchecked to tax Indian Treaty fishery income, to withdraw support from Indian governments in litigation regarding tribal sovereignty and economic development issues, to deny Indian trust land acquisitions, to curtail intended support of programs and services to the Alaska Native governments and people and to set the oil-owning Tribes back to square-one with regard to oil thefts and skimmed royalties."

Jeannette Wolfley, of the Native American Rights Fund, has sent correspondence to the U.S. Senators in support of the Treaty Task Force, explaining that:

> "The Native American Rights Fund is the largest non-profit Indian legal rights organization in the United States. We represent several members of Indian Tribes in Michigan in opposing current efforts by the IRS to impose Federal taxes derived from Treaty-protected commercial fishing activities. This unwarranted, unprecedented attack on Indian Treaty resources has been opposed by two separate Interior Department Solicitors over the past six years and by strongly worded statements from Interior Secretary Hodel. The Justice Department, unfortunately, rendered an opinion in this intra-departmental dispute favoring the IRS' position as the "sounder view of the law."

THE DISPUTE: TAX STATUS AND THE TREATIES

Interior Secretary Hodel wrote Attorney General Meese on March 22, 1985, seeking a resolution of the intra-departmental dispute concluding that the imposition of a tax represented an "attack on the unique relationship between the United States and Stevens' Treaty Tribes, and MARKS AN ABRUPT DEPARTURE" from the

Administration's policy." (Capitalize Emphasis Added) The Justice Department's opinion on December 11, 1985, was that the IRS was the "sounder view of the law," CONTENDING THAT UNLESS FEDERAL INCOME TAX EXEMPTION WAS CONTAINED IN THE TREATIES, INDIANS WOULD BE SUBJECT TO TAX. How, Indian leaders ask, could the 1855 Treaty of Point Elliott contain language on Income Tax exemption when the INCOME TAX LAWS WERE ENACTED IN 1913, and only then by specific Amendment to the United States Constitution (16th Amendment)

The Indian Tribal governments have been supported in this intradepartmental dispute by the Interior Department, including two separate Solicitor opinions in 1983 and 1985. According to Interior Secretary Don Hodel in his March 22, 1985 letter to Attorney General Meese:

> "The Stevens' Treaties have been interpreted by the Supreme Court to reserve to the Indians the rights to fish commercially, limited only to the extent that non-Indians must also be afforded the opportunity to fish and that Indian Treaty fishing may be regulated by the States (or the Federal government) for resource conservation purposes. Indian who were parties to the Steven's treaties understood that they would be able to continue fishing and trading fish without in any way having to turn over to the Federal government a portion of their catch. DIMINUATION OF THE TREATY FISHING RIGHTS THROUGH THE IMPOSITION OF A TAX NOT ONLY REPRESENTS AN ATTACK ON THE UNIQUE RELATIONSHIP EXISTING BETWEEN THE UNITED STATES AND STEVENS' TREATY TRIBES, but marks an abrupt departure from President Reagan's January 24, 1983, Indian Policy Statement which reaffirms the Federal government's responsibility involving Indian natural resources and which further encourages the development of strong reservation economies." (Capitalize Emphasis Added)

SUPPORT FROM THE SENATE: THE DEAR COLLEAGUE LETTER (SEE TAB C)

United States Senator Bill Bradley was very concerned about this issue and, in an informative letter to his colleagues, dated June 10, 1986, stated that:

> "American Indian Tribes, including the Lummi Tribe, have fished in coastal waters and rivers of the Pacific Northwest for generations. A 1855 Treaty between the U.S. government and the Lummis confirmed the Tribes' fishing rights were to be unemcumbered by regulation. The US Supreme Court has upheld, seven times--twice in this decade--these Indian Tribal fishing rights, including

> commercial fishing and its economic benefits.
>
> "The Internal Revenue Service has decided to attack this long-standing and recognized right. As the attached news article explains, the IRS has decided that the Northwest tribal fishermen must pay Federal taxes on income from salmon fishing in their established 'usual and accustomed' fishing areas. The IRS has asserted that they can collect taxes on income earned by Indian tribal members where no Federal statute or Treaty specifically exempts those individuals from imposition of the federal income tax. IT IS IMPOSSIBLE THAT A 131-YEAR OLD TREATY COULD HAVE ENVISIONED AN EXEMPTION FROM AN INCOME TAX WHICH DID NOT EXIST AT THE TIME OF THE TREATY WAS ADOPTED." (Capitalize Emphasis Added)

The Senators' reaction to the "Dear Colleague" letter was heartening to Indian Country. A bipartisan letter, signed by 33 Senators, and addressed to U.S. Attorney General Edwin Meese on July 17, 1986, obviously rebukes the political sham perpetrated by segments of the Administration. The letter states:

> "We express our concern and objections to the attempts by the IRS to impose Federal taxes on income derived from Treaty-designated waters. TWO SEPARATE OPINIONS BY THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR IN 1983 and 1985 CLEARLY SUPPORT THE INDIAN TRIBAL POSITION that income derived from treaty resources should not be subject to Federal taxation. The Secretary of Interior has agreed that the imposition of the tax by the IRS "represents an attack on the unique relationship between the United States and the Stevens' Treaty (Lummi) Tribes." The recent Justice Department's opinion nonetheless favored the Treasury Department in this intra-departmental dispute. Based on established Indian law and court opinions, WE FIND THE JUSTICE DEPARTMENT REASONING SERIOUSLY FLAWED.
>
> "The Treaty between the Lummi Tribe and the United States government dates from 1855. Indian Tribal resources, reserved in their Treaties, SHOULD NOT BE SUBJECT TO FEDERAL TAXATION. In the President's Indian Policy Statement of January 24, 1983 he spoke of "government-to-government" relations with Indian Tribes. Given this policy, IT IS CERTAINLY DIFFI-

> CULT TO UNDERSTAND HOW THE UNITED STATES CAN IMPOSE TAXES ON THE RESOURCES OF THESE TRIBAL GOVERNMENTS WITHOUT THEIR ADVICE AND CONSENT.
>
> "We urge you to reverse the ill-advised policy without delay." (Capitalized Emphasis Added)

Representative Mike Lowry, of Washington State, entered the following remarks in his effort to urge his colleagues to oppose the IRS position as follows (Congressional Record, under "Extension of Remarks", dated April 17, 1986):

> "In making Treaties with the United States, American Indian Tribes gave away incalculable wealth in land and natural resources. In exchange, they were guaranteed certain rights and were promised protection from non-Indian encroachment. These rights and protections are the cornerstones of the Tribes' efforts to become economically independent, a goal supported by the current Administration's 1983 Indian Policy Statement. OUR NATION HAS BROKEN FAITH FAR TOO MANY TIMES. Action by the IRS must not add to THIS SHAMEFUL LEGACY."
>
> This Administration's economic policies have been marked by lavish tax cuts for corporations and for the wealthy, for lower funding for vital domestic programs, and for massive increases in military spending. It is no wonder that the Administration is looking for new sources of revenue. However, INSTEAD OF TRYING TO RAISE REVENUE BY TAXING INDIAN RESOURCES THAT ARE PROTECTED BY LAW, THE ADMINISTRATION SHOULD DEVELOP ECONOMIC POLICIES THAT ARE FAIR, EQUITABLE, AND WHICH MAKE SENSE." (Capitalized Emphasis Added)

THE INDIAN FISHING RIGHTS AMENDMENT

Political statements and a letter from 33 Senators impressed neither the Justice Department nor the IRS. Senator Bradley, joined by Senator Dan Evans of Washington State, added an Indian Fishing Rights Amendment to the Debt Ceiling Bill. RES. 668 was ADDED WITH THE SOLE PURPOSE OF CLARIFYING THE INCOME TAX EXEMPTION OF INDIAN FISHING RIGHTS.

Senator Bill Bradley (D-NJ) and Senator Dan Evans (R-WA) entered the following statement in the Congressional Record (Senate, August 1, 1986):

> "There is an important principal at stake here. I THINK WE SHOULD NOT BREAK ANY MORE TREATIES WITH NATIVE AMERICANS, and certainly we should not allow the Internal Revenue Service to break a Treaty that has been adhered to by the U.S. Government for 131 years. THIS AMENDMENT WOULD RECTIFY THAT SITUATION." (Capitalized Emphasis Added)

The amendment was included in the Senate Bill approved in early August, 1986. It enjoyed bipartisan support in the Senate and had wide support in the House of Representatives, as well. In addition, it RESPONDED TO THE RECOMMENDATION OF THE WHITE HOUSE OFFICE OF INTERGOVERNMENTAL AFFAIRS, CALLING FOR A LEGISLATIVE (NON-LITIGATIVE) SOLUTION. Despite the reasonableness of the Amendment, and its support in Congress, it was stalled, and ultimately defeated by the House Ways and Means Committee. The Amendment was stripped along with all other Amendments from H.J. Res. 668.

THE INDIAN FISHING RIGHTS BILL (SEE TAB D)

On March 12, 1987, the Indian Fishing Rights Bill was introduced to the U.S. Senate by Senators Evans (R-WA), Adams (D-WA), Bradley (D-NJ), Inouye (D-HA), McCain (R-AZ), and DeConcini (D-AZ). The bill, like the amendment, reaffirms the tax-exempt status of these Treaty resources. The Treaty Task Force and the associated Tribes, the local and national Indian organizations, and the non-Indian support groups (both in this country and abroad) stand in support of the Bill. The 100th Congress, on the 200th Anniversary of the U.S. Constitution, will now determine the fate of the Bill and the future of Treaty relations with American Indian Tribes.

THE SAD IRONY: TREATIES ON TRIAL

Congress now has the opportunity to reaffirm the rights of Indian Tribes, protected and reserved in the Treaties, to fish in their "usual and accustomed" waters. The Treaty Task Force, after a significant expenditure of both time and money, now awaits the outcome. The 300 Treaty Tribes in the United States are watching. national intertribal organizations throughout the United States are watching, and, leaders in the Christian and Jewish community are witnesses, as well. And, the international community waits to see if the high principles of governance, expressed in the Constitution, are manifest in the actions of Congress. The

Treaties are on trial and so, perhaps, is the very spirit of democracy. While there are many ways of viewing this tragic action by the IRS, one sad irony emerges from the mass of misunderstanding; that is: AMERICAN INDIAN TRIBAL GOVERNMENTS, RESPONSIBLE FOR THE TREATY RIGHTS OF THEIR PEOPLE, HAVE NEVER BEEN OFFICIALLY CONSULTED IN THIS EFFORT BY THE IRS!

CITIZENSHIP OR "INDIANS NOT TAXED"

Since passage of the 1924 Indian Citizenship Act, the Internal Revenue Service has challenged American Indians, who are on trial for failure to pay federal income taxes, to specifically show language inside applicable treaties that could be used to argue a "tax exemption" was provided for, only then can they be exempt from payment of federal income taxes. Recent opinions of the Department of Interior (1983 and 1985) and the Department of Justice (1985) - on behalf of the Internal Revenue Service - have cited numerous cases where Indians failed to show treaty language that could provide the necessary exemption. The Internal Revenue Service has been applying federal income tax laws to income of American Indians that were previously exempt - being said income was derived from the harvest of resources reserved by treaty and specifically for the Indians.

The American Indians were once referred to as the "Indians not taxed." This principle concept was in reflection of the separateness between the United States Citizens and the "Indians not Taxed." Neither the States or the Federal government viewed the Indians as citizens or within their taxing power, originally. It was the intention of more than 350 treaties made between Indians and the United States government to keep each others people and territories separate. This is reflected in the very wording of the United States Constitution...which provides "excluding Indians not taxed." The question here is what is right, the 1924 Indian Citizenship Act or the Constitution as ratified and presently worded.

Indian Tribes, nationwide, have been watching the recent "legal" confrontations between the Federal government - Internal Revenue Service, and Lummi "Indians not taxed." This issue is not new to the United States of America. The definition quoted was developed by the Founding Fathers of the Constitution, and retained through the Reconstruction Debates that ended with the ratification of the Fourteenth and Fifteenth Amendments. Ever since the enactment of the 1924 Indian Citizenship Act, court room battles have been waged against Indian country...."Indians not taxed." The Internal Revenue Service argues that because Indians were Congressionally made citizens, by said act, that they are subject to all the tax laws of general application to all other citizens.

The leading tax case cited by the federal attorneys is that of Squire v. Capoeman, 351 U.S. 1 (1956), in which the Supreme Court considered whether capital gains from the sale of standing timber on lands allotted to noncompetent Indians was subject to the federal Income tax. The court began its analysis in Squire with the principle that: "Indians are citizens and... in ordinary affairs in life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens." This leading case was used to argue against treaty resource income exemptions of the Pacific Northwest Indian tribes. In Earl v. Commissioner, 78 T.C. 1014 (1982) it was argued that "treaty Indians" were "citizens" and all citizens pay taxes, therefore Indians will have to pay federal income taxes on treaty derived income.

While Treaty Tribes consider opinions of the Department of Justice (1985), as supports the Internal Revenue Service, to be seriously flawed in legal logic, there is a greater issue at stake here. That is, the legal foundation to the Internal Revenue Service's arguments in all its cases in "tax court" is the "citizenship" of American Indians. The 1924 Indian Citizenship Act claims to have made all Indians citizens, but the original wording of the United States Constitution - and in its present form - defines American Indians as "Indians not taxed." While it is easily surmised an act of Congress is not proper constitutional amendment, there remain the question as whether or not "excluding Indians not taxed" is still valid constitutionally; or is the Internal Revenue Service right in its presentations that American Indians are "citizens of the United States of America," and "subject to the jurisdiction thereof."

Hereunder, we look to the United States Constitution for the current wording that is definitive of the relationship the American Indian has to this constitutional government.

David Hutchison, in The Foundations of the Constitution (p. 35), points out the history of the Rule of Apportionment. On March 6, 1783, the Committee on Revenue made a report to Congress, one part of which proposed to abolish article eight of the Articles of Confederation which made land the basis of taxation, and to substitute an article providing that the common treasury be supplied by the several states in proportion to the number of inhabitants of every age, sex, and condition, except Indians not paying taxes in each state, which number shall be triennially taken, and transmitted to the United States in Congress assembled in such mode as they shall direct, and appoint, provided always that in such enumeration no persons shall be included, who are bound to servitude for life, according to the laws of the state to which they belong, other than such as may be between the ages of

--- years. It is obvious that we have here the first outline of the clause in the constitution. On April 18th, the revenue plan was passed by Congress as amended." (Underlined Emphasis Added)

Article I, section 2, clause 3 of the Constitution provides that:

"Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, excluding those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons...." (Underlined Emphasis Added)

The expression, excluding Indians not taxed, is found in the Fourteenth Amendment, where it deals with the same subject under the new conditions produced by the emancipation of the slaves. It appears therein as follows:

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed...."

In the debates of the federal constitutional convention of 1787, there is little said about the relationship the Indians bore to the United States. On the other hand, the problems of apportionment of representatives and direct taxes were cause of great debate and extensive writings. In view of this, it is only reasonable to assume that the delegates to the convention were so clearly cognizant of the meaning of the phrase "Indians not taxed" as to render any consideration of it unnecessary.

Indians, members of sovereign and separate communities or tribes were outside of the community of people of the United States even though they might be located within the geographical boundaries of a state. Their status was well described by Chancellor Kent when in 1823 he said:

"Though born within our territorial limits, the Indians are considered as born under the dominion of their tribes. They are not our subjects, born within the purviews of the law, because they are not born in obedience to us. They belong, by birth, to their own tribes, and these tribes are placed under our protection and dependent upon us; but still we recognize them as national communities...."

"Again, in 1776, Congress tendered protection and friendship to the Indians, and resolved, that no Indians should be employed as soldiers in the armies of the United States, before the tribe, to which they belonged, should, in a national council, have consented thereunto, nor then, without the express approbation of Congress. What acts of government more clearly and strongly designate these Indians as totally detached from our body politic, and as separate and independent communities." (Goodell v. Jackson, 20 Johns. 693, 711.)

"To describe these Indians who were not a part of the community of people of the United States the phrase "Indians not taxed" was chosen. The reasons for the choice of the particular phrase are easily surmised. It reflected, first, the prevalent notion that taxation and representation should go hand in hand. It reflected, secondly, the fact that in a less complex system of government taxation is the principle criterion of government authority. No more significant attribute of the condition of the Indian living in his separate and independent community should have been chosen. Being outside the control of either State or Federal Government, he was an "Indian not taxed," and since he did not bear the financial burden of the government, he was not entitled to representation therein." (United States v. Kagama, 118 U.S. 375, 378.) (Underlined Emphasis Added)

The conditions of these Indians as a people separate from the community of people of the United States had not changed by the time of the adoption of the Fourteenth Amendment. Their exemption from the application of States laws had been affirmed by the Supreme Court on more than one occasion. (Worcester v. Georgia, 6 Pet. 515)

At the same session of the Congress which approved the Fourteenth Amendment and which submitted it to the States for adoption, the Civil Rights Bill of 1866 was passed. Act of April 9, 1866 (14 Stat. 27). It provided that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." (Underlined Emphasis Added)

The Solicitor for the Department of Interior in his Opinions of The Solicitor, November 7, 1940 stated: In the bill as originally reported from the Judiciary Committee there were no words excluding "Indians not taxed" from the citizenship proposed to be granted. Attention being called to this fact, the friends of the measure disclaimed any purpose to make citizens of those who were in tribal relations with government of their own. In order to meet that objection, while conforming to the wishes of those desiring to invest with citizenship all Indians permanently separated from their tribes, and who, by reason of their residence away from their tribes, constituted a part of the people under the jurisdiction of the United States. Mr. Trumbull, who reported the bill, modified it by inserting the words, "excluding Indians not taxed." What was intended by that modification appears from the following language used by him in debate?"

"... Of course we cannot declare the wild Indians who do not recognize the Government of the United States at all, who are not subject to our laws, with whom we make treaties, who have their own regulations, whom we do not pretend to interfere with or punish for the commission of crimes one upon the other, to be subjects of the United States in the sense of being citizens. They must be excepted. The Constitution of the United States excludes them from the enumeration of the population of the United States, when it says that Indians not taxed are to be excluded. It has occurred to me that perhaps an amendment would meet the views of all gentlemen, which used these constitutional words, and said that all persons born in the United Stats, excluding Indians not taxed, and not subject to any foreign Power, shall be deemed citizens of the United States." (Cong. Globe, 1st sess., 39th Cong., p.527) (Underlined Emphasis Added)

The understanding of the Congress as to the meaning of the phrase as it appears in the Constitution was expressed by Mr. Trumbull: "It is a constitutional term used by the men who made the Constitution itself to designate.... a class of persons who were not a part of our population. (Ibid., p.572)

It is not surprising then to find the following statement in a report of the Judiciary Committee to the Senate of the United States on the 14th of December, 1870, in obedience to an instruction to inquire as to the effect of the Fourteenth Amendment upon the treaties which the United States had with various Indian tribes of the country:

"During the war slavery had been abolished, and the former slaves had become citizens of the United States; consequently, in determining the basis of representation in the fourteenth amendment, the clause 'three-fifths of all other persons' is wholly omitted; but the clause 'excluding the Indians not taxed' is retained. (Underlined Emphasis Added)

"The inference is irresistible that the amendment was intended to recognize the change in the status of the former slave which had been effected during the war, while it recognizes no change in the status of the Indians. They were excluded by the original constitution, and in the same terms are excluded by the amendment from the constituent body, the people."

"The exclusion of the Indians from the constituent body, the people, was reflected too in their exclusion from the operation of both State and Federal tax laws. As at the time of the adoption of the Constitution these Indians were not subject to taxation, so too were they not subject to taxation at the time of the adoption of the Fourteenth Amendment. This attribute of their status remained the same and it was retained as descriptive of a status which likewise had remained the same."

During the reconstruction debates over the 14th Amendment, the Senate (39th Cong. 1st Sess. (May 29-30, 1866)) had addressed House Joint Resolution No. 127. This was the resolution that introduced the proposed language to be included in the First and Second sections of said amendment. Members of the Senate debated whether or not the provisions of the 14th amendment should be extended to the "Indians not taxed" or "wild Indians" or "Indians remaining in tribal relations." The debate was upon issue as to whether or not the language "excluding Indians not taxed" should be in both sections of the amendment. However, what was not disputed was the fact that the "Indians" were not to be made "citizens of the United States of America." (Underlined Emphasis Added)

In the first section, it was provided, the Indians were excluded by the wording of "subject to the jurisdiction thereof." Mr. Trumbull, Chairman of the Committee on the Judiciary, stated this point in the debates, as follows: ..."The provision is, that "all persons born in the United States, and subject to the jurisdiction thereof." Now, does the Senator from Wisconsin pretend to say that the Navajoe Indians are subject to the complete jurisdiction of the United States? What do we mean by "subject to the jurisdiction of the United States? Not owing allegience to anybody else. That is what it means. Can you sue a Navajoe Indian in Court? Are they in any sense subject to the complete jurisdiction of the United States? By no means. We make treaties with them, and therefore they are not subject to our jurisdiction. If they were, we would not make treaties with them...." (39th Cong. 1st Sess. (May 29-30, 1866))

Mr. Howard, Senator from Michigan, stated that "...Certainly, Gentlemen cannot content that an Indian belonging to a tribe, although born within the limits of a State, is subject to this full and complete jurisdiction. That question has only since been adjudicated, so far as the usage of the Government is concerned. The Government of the United States have always regarded and treated the Indian tribes within our limits as Foreign Powers, so far as the treaty-making power is concerned, and so far especially as the commercial power is concerned, for in the very Constitution itself there is a provision that Congress shall have power to regulate commerce, not only with foreign nations and among the States, but also with the Indian Tribes. That clause, in my judgment, presents a full and complete recognition of the national character of the Indian tribes, the same character in which they have been recognized ever since the discovery of the continent and its occupation by civilized men; the same alight in the Indians were viewed and treated by Great Britain from the earliest commencement of the settlement of the continent. (39th Cong. 1st Sess. (May 29-30, 1866))

Mr. Williams pointed out in the debate his observations, as follows: "I would not agree to this proposed constitutional amendment if I supposed it made Indians not taxed citizens of the United States. But I am satisfied that, giving to the amendment a fair and reasonable construction, it does not include Indians not taxed. The first and second sections of this proposed amendment are to be taken together, are to be construed together, and the meaning of the word "citizens" as employed in both sections, is to be determined from the manner in which that word is used in both of those sections. (39th Cong. 1st Sess. (May 29-30, 1866)) (Underlined Emphasis Added)

Now, can any reasonable man conclude that the word "citizens" there applies to Indians not taxed, or includes Indians not taxed, when they are expressly excluded from the basis of representation and cannot even be taken into the enumeration of persons upon whom representation is to be based? I think it is pretty clear, when you put the first and second sections together, that Indians not taxed are excluded from the term "citizens;" because it cannot be supposed for one moment that the term "citizens," as employed in these two sections, is intended to apply to Indians who are not even counted under any circumstances as a part of the basis of representation. I therefore think that the amendment of the Senator from Wisconsin is clearly unnecessary. I do not believe that "Indians not taxed" are included, and I understand that to be descriptive of Indians who maintain their tribal relations and who are not in all respects subject to the jurisdiction of the United States." (39th Cong. 1st Sess. (May 29-30, 1866)) (Underlined Emphasis Added)

The Internal Revenue Service argues that the 1924 Citizenship Act authorizes taxing jurisdiction. If this is true then said Act does so very ambiguously. In most cases of legislation, the act must be specific and clear and not ambiguously worded. But, in accordance to the IRS - as supported by the Department of Justice - this is not so. They take ambiguous laws, and perhaps unconstitutional laws,and apply the same to Indian country at will. In Indian case history, the courts usually require showing that the intent to apply the law to Indian country was clearly intended by the Congress. But, in the case of the Tax Courts, this is not the rule. The tax court and its "court officials" - the IRS Attorneys - will continue to apply ambiguous taxing authority to Indian Country, until such time the tribal goverments are able to unite and force Judicial control to be used and a review of the constitutionality of the Indian Citizenship Act fully addressed by the U.S. Supreme Court or Congress assembled.

We must understand the reasons for the passage of the 1924 Indian Citizenship Act. But, first, let us look at the wording of said enactment, as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property." Approved, June 2, 1924.

Where in this enactment does it say that the Internal Revenue Code shall be specifically applied to the land, resources, and incomes of Indian people...NOWHERE DOES IT SAY THIS! Reread all that follows the word "Provided". This clearly means that this Act was not to disrupt the protections reserved by or secured to the Indian people. And yet, the IRS allegedly is able to read that the whole tax code of the United States was impliedly applied to all of Indian Country. We claim that this is false and not the true intention of the law, as passed. In fact, on the very day that the "citizenship" was granted to the Indian people, the U.S. Congress was addressing the "Revenue Act of 1924": and, if the real reason was to apply tax laws to Indian Country, then said Act would have been the logical location to enact such legislative authorization for the Internal Revenue Service.

There are other historical arguments that hold Indians were not to be taxed. As early as 1798 the Federal Government had imposed a direct tax upon real estate and slaves. Act of July 14, 1798, (1 Stat. 597). "In the summer of 1813 a direct tax was again assessed on real estate and slaves and Congress laid duties on carriages, a duty on refined sugar, a license tax upon distillers of spirituous liquors, stamp duties, an auction tax, and license tax upon retailers of wines and spirituous liquors," (Dewey, Financial History of the United States, page 139). By 1862 so many internal revenue taxes were being laid by the Federal Government that one writer concisely described the revenue measure of that year as follows:

> "Wherever you find an article, a product, a trade, a profession, or a source of income, tax it." (Well Practical Economics, New York, 1885)

In 1861 the first Federal income tax was authorized to be levied "upon the annual income of every person residing in the United States,...derived...from any...source whatever." Act of August 5, 1861 (12 Stat.292, 309). The tax was increased in 1862 and in 1865, decreased in 1867 and finally abolished in 1872" (Dewey, Financial History of the United States, page 305.)

The special significance is that in no instance were any of these numerous taxes applied to Indians living in their separate tribal communities, even though, as in the case of the income tax, it was by its provisions intended to apply to "every person residing in the United States." The reason for the non-application of such a tax to Indians was the same as the reason for the non-application of all laws of general application to Indians. They were considered a people separate from the community of people of the United States; and thus, it was not to be inferred, in the absence of clear and unambiguous language to the contrary, that Congress intended to subject them to a law which by its terms applied to every person residing in the United States. Elk v. Wilkins, 112 U.S. 94.

In fact, the reason the Indian Citizenship Act was enacted had nothing to do with taxation of Indians. The intent was to secure First Amendment Rights of the U.S. Constitution for American Indians. (The Hopi by Harry James, 1974) This was because the Commissioner of Indian Affairs, Charles Burke, had drafted, implemented, and began the enforcement of the "Religious Crimes Code", from 1921 to 1924. This code had the specific aim of eliminating American Indian Religions. When the Commissioner began to have Native Americans imprisoned, this got the attention of Indian support groups in California. The foremost was the Indian Welfare League; the others were the National Association to Help the Indian, and the Indian Defense Association of Northern California.

It was the brainstorm of a member of the Indian Welfare League that American Indians should be made "citizen". This person was Ida May Adams, a Los Angeles Lawyer. She believed Indian people would be given the First Amendment Religious Freedom guarantees, if they were citizens. The Act was not intended to affect any other part of the Indian's life or property holdings and rights. The American Indian Religious Freedom Act was passed in 1978, 54 years after the Citizenship Act.

We do not believe the 1924 Indian Citizenship Act expanded the powers of the Internal Revenue Service. The IRS should not be inside Indian Country and taxing. The United States government should not continue to violate their own constitution, and the Federal courts should not continue to ignore such violations--under the disguise that it is a political question between the Indian Tribes and the Politicians. The real question is, what is the process for the U.S. Congress to apply the taxing and representation powers over Indian Country. We argue that it is specifically worded within the Fifth Article of the Constitution...the amendment process.

The U.S. Constitution was amended twenty-three times, and five other amendments were proposed, but never ratified, by the required three-fourths of the States. Amendment Fourteen was specifically added to address the freed negro slaves, the Chinese, and the people from "India". To prove that it was not intended to be applied to the American aboriginal Indians, the wording "Excluding Indians Not Taxed" was retained in the second section of the amendment and clearly by the words "subject to the jurisdiction thereof" in the first section. Article I of the Constitution was further amended to provide for the suffrage of American women, as ratified in 1920. It is significant to point out that the amendment process is applicable to Congress assembled and its dealings with American Indians. They can continue to argue that their actions are justified as "political questions", in reality, and sooner or later, they will have to account for having weakened the constitutional value of their mandated duties and powers.

It is the Senators and Representatives that will have to respond to the questions of taxing power raised by the Internal Revenue Service. Congress and the Courts primary targets of Felix Cohens' quote:

> "Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of the American Indian, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith..." (1953)

If the Congressmen, and Congress assembled, fail to correct the errors of the Internal Revenue Service, then they are only further perpetuating the neglect of the mandates of the constitution. America's form of constitutional democracy is precariously fragile. If the President, as Chief Executive, cannot or will not issue an Executive Order to the Internal Revenue Service, directing their withdrawal from inside the borders of Indian Country, then it will be the job of Congress assembled to do so through an amendment, resolution, or bill.

The IRS is implementing its own agenda that includes taxing all treaty rights that guarantee to the American Indian people their control and enjoyment of land resources reserved by treaties for future generations. Career officials and career staff counsels are developing their own policy on Indian Country. Such agendas are contrary to the President's 1983 Indian Policy. However, the reason such career personalities are able to implement their own agendas was typified by President Harry S. Truman, in 1948, as follows:

> "The difficulty with many career officials in the government is that they regard themselves as the men who really make policy and run the government. They look upon elected officials as just temporary occupants. Every president in our history has been faced with this problem: how to prevent career men from circumventing presidential policy. Too often career men seek to impose their own views instead of carrying out the established policy of the Administration. Sometimes they achieve this by influencing the key men appointed by the President to put his policies into operation..."

We can see that the career officials of the Internal Revenue Service have been able to exercise this very type of influence over the President's men. In this case, the Secretary of Treasury and the Attorney General both signed off on the IRS agenda. Both have signed onto legal opinions that hold that to apply the taxes is the "sounder view of the law." Even though the President has declared that it is his policy to NOT ABROGATE TREATIES MADE WITH THE INDIAN TRIBES, and even though the U.S. Constitution make said treaties the supreme law of the land, and even though the U.S. Constitution still provides "Excluding Indians not taxed," the IRS was able to convince said appointees that their agenda was a valid one. One check on such ambiguous use of the taxing power, and its development in accordance to the IRS agenda, in lieu of Congress, should have been within the Federal courts.

Oliver Ellsworth said in the Connecticut Convention, January 7, 1788: "If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure the impartiality, are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is usurpation upon the general government, the law is void; and upright, independent judges will declare it to be so." (David Hutchison, The Foundation of the Constitution, p. 272) "A careful study shows that the members understood the Federal judiciary was to declare both state and United States laws void. All these men held firmly to the idea that the Constitution required the Federal courts to declare state and national laws void, if they contravened the Constitution of the United States. These were the men who framed the Constitution, and they all expected the Federal courts to exercise judicial control over legislation." (Ibid., p. 272)

President Franklin D. Roosevelt remarked upon this subject in his radio address on March 9, 1937, as follows:

> "I want -- as all Americans want -- an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written--that will refuse to amend the Constitution by the arbitrary exercise of judicial power -- amendment by judicial sayso"

Now, we hold that for any of the Federal courts, entrusted by and empowered by the authority of the United States, that refuse to read the Constitution as written, and that refuse to acknowledge that the U.S. Constitution has never been amended as to the "Excluding Indians not taxed" language, is doing just what President Roosevelt feared and disliked, "amendment by judicial sayso." And, this is exactly what happened when the Federal courts refused to decide in favor of the Six Nations Confederacy, in 1948, when they argued the failure to amend the Constitution before the courts. (Jessie Pierce v. New York, 1948)

Since passage of the "Indian Citizenship Act", the Internal Revenue Service has been prosecuting American Indians in Tax Courts as if the Act itself was a proper amendment to the Constitution, Article V notwithstanding. Since 1924, this citizenship question has surfaced time and time again in the Tax Courts, with rulings always holding that since Indians are citizens, they must pay the federal income taxes. It is a duty of the court to read the Constitution as it is presently written, wherein we find the words "excluding Indians not taxed."

This obligation is well versed by Justice Cooley, in his classic commentaries on the Constitution: "A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have changed as perhaps to make a different rule in the case seem desirable. A principle share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion.... Public sentiment and action effect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty. The violence of public passion is quite as likely to be in the direction of oppression as in any other; and the necessity for bills of rights in our fundamental laws lies mainly in the danger that the legislature will be influenced, by temporary excitements and passions among the people themselves, to make such changes as new circumstances may require. The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it. The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it. *Cooley's Constitutional Limitations*, 68-69 (6th ed. 1890).

Because the Federal court has refused to exercise its judicial control over the "1924 Indian Citizenship Act" and rule it null, void, and contrary to the language of Article I of the United States Constitution, the Internal Revenue Service has been using said enactment to tax rights and resources of American Indians. The specific attack upon the treaty rights of the Indians of the Pacific Northwest is at issue here. It is within the powers of the United States Congress to pass a congressional solution that will retroactively reverse the damage done to the fishing rights and incomes of the Indians.

Hopefully, S. 727 and companion legislation in the House of Representatives will effectively clarify that American Indian Tribal Treaty-protected fishing rights and that the income of Tribal members from harvest of this resource in treaty-designated areas will not be subject to further IRS attempts to impose Federal taxes. We support the purpose and intentions of S. 727 and request that report or statute language be incorporated to make perfectly clear that Federal taxation of Tribal fishermen exercising their treaty fishing rights is against the law.

LUMMI INDIAN BUSINESS COUNCIL
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ISSUE: SENATE PASSAGE OF THE S. 727, THE "INDIAN FISHING RIGHTS" BILL, OF THE 100TH CONGRESS

BACKGROUND

PACIFIC NORTHWEST TRIBES RESERVED FISHING RIGHTS-IN THEIR TREATIES

Pacific Northwest Indian Tribes reserved in their treaties, with the United States, the right to harvest fish in their "usual & accustomed grounds and stations." The Tribal treaty fishing rights have been upheld by the Supreme Court seven times in this century. This was not a right given by the United States, but a right reserved by the tribes and their people.

INTERNAL REVENUE SERVICE ATTEMPTS TO TAX INCOME DERIVED FROM EXERCISING THE TREATY RIGHTS

Since 1982, the Internal Revenue Service has attempted to impose federal income taxes upon tribal commercial fishermen who have exercised treaty-rights under tribal regulation, in areas reserved and protected by treaty. This unprecedented action by the IRS, after 127 years since ratification of the treaties by the Senate, does not recognize the modern day property ownership rights of the tribe, for its membership; nor was the tribal government ever consulted on a government basis.

INTER-DEPARTMENTAL DISPUTE BETWEEN TREASURY, JUSTICE, AND INTERIOR ON LEGALITY OF IRS ACTIONS

The Department of Treasury's Internal Revenue Service and the Department of Interior disagreed on the legality of the application of the federal tax laws to the income derived from exercising the treaty rights. While the Interior Department is the administration's expertise on "Indian law" and also strongly supported the Tribal position, the Department of Justice intervened in 1985 and ruled that the IRS opinion was the "sounder view of the law." The Justice Department contention was that the Tribes had failed to foresee the 1913 U.S. Constitutional (16th) amendment which created the Federal income tax, and consequently failed to have language within their respective treaties that would have prevented the application of federal taxation. The Lummi Indian Tribe was a party in the Treaty of Point Elliott in 1855.

SENATE BIPARTISAN SUPPORT AND THE INDIAN FISHING RIGHTS AMENDMENT ATTACHED TO H.J. RES. 668 IN THE 99TH CONGRESS

Senator Bradley, and 32 co-sponsors, sent a bipartisan letter to the Justice Department (7-17-86) describing the Department's opinion, given established Indian law and court opinions, as "reasoning seriously flawed." The letter urged the Department "to reverse this ill-advised policy without delay." Upon failure of the Department to heed the words of the Senators, the "Indian Fishing Rights Amendment" was attached to H.J.RES. #668, by Senators Bradley and Dan Evans. Evans concluded: "The only alternative remaining open to us is this piece of legislation." However, due to reasons unrelated to the merits of the Indian Fishing Rights amendment, all amendments were stripped from the resolution; thereby, leaving the issue unresolved for the 100th Congress to address.

SENATE SELECT COMMITTEE ON INDIAN AFFAIRS PROPOSES LEGISLATION DURING THE 100TH CONGRESS

Senate Bill #727 was introduced on March 12th, by Senators Evans, for himself and Senators Bradley, Inouye, DeConcini, Adams, and McCain. The purpose of the bill is to "clarify Indian treaties and executive orders with respect to fishing rights," by amending the Act of March 3, 1871, to read: "Provided, that such treaties and any executive orders under which any Indian tribe is recognized, shall be construed to prohibit the imposition, under Federal law or under any law of a State or political subdivision thereof, of any tax on any income derived by an Indian from the exercise of rights to fish secured by such treaty or executive order, regardless of whether such rights are limited to subsistence or commercial fishing." The bill also retroactively cancels previous IRS tax assessments against Indian Treaty-protected commercial fishing income.

THIS BILL CONFIRMS THE PRINCIPLE THAT GENERAL ACTS OF CONGRESS DO NOT APPLY TO INDIANS, UNLESS MANIFESTLY INTENDED, REVENUE LAWS NOTWITHSTANDING

Because the Internal Revenue Service has chosen to accelerate its efforts to exact income taxes from treaty reserved fishing rights, this bill is submitted to reconfirm Congressional policy and principle. The principle being, "that general acts of Congress do not apply to Indians unless so worded as to manifest a clear intention to include them; that Indians have always been the object of special legislation, and that general legislation, and especially revenue laws, which burden and restrict the use and enjoyment of property, should not be applied to Indians, unless Congress in clear and unambiguous language so directs." 35 Ops. Atty. Gen. 1 (1925).

INTERIOR DEPARTMENT, SPEAKING FOR THE REAGAN ADMINISTRATION, SUPPORTS PASSAGE OF S. 727

The Senate Select Committee on Indian Affairs held a (3/27/87) hearing on S. 727. Interior Department Assistant Secretary for Indian Affairs, Ross Swimmer, spoke on behalf of the administration supporting S.727. Excerpts from the administration testimony clearly states the issues:

"At the time Indian treaties were signed, many tribes reserved to themselves the right to fish in perpetuity. Additionally, and as partial compensation for the land ceded by the tribes, the Federal government has assumed a trust responsibility that guarantees federal protection of Indian fishing rights. By the terms of their treaties, the tribes shared a resource that they alone had previously used. It seems unfair to us to require them now to share, through the imposition of Federal taxes, the proceeds from the part of the fishery that it was agreed they would retain for themselves. The Indians who were parties to the treaties thought they would be able to continue to fish and trade fish as they had in the past, when they did not pay taxes, and were not required in any way to turn over a portion of their catch to the Government. Some courts have precluded states from taxing Indian fishing activities. I believe that the Congress should apply the same rule to the Federal Government."

"Lifting this tax burden will, at minimal costs to the Federal Government, contribute to the implementation of the President's policy in support of the development of Indian reservation economies. The president noted in his policy statement, which was announced on January 24, 1983, that tribal fishing resources provide an avenue of development for many tribes. He initiated an effort to identify and remove Federal barriers to the development of tribal resources and to create a positive environment for the development and growth of reservation economies."

CONGRESSIONAL SUPPORT NEEDED FOR PASSAGE OF S. 727 IN THE 100TH CONGRESS

Bipartisan Senate support and administration endorsement for the Indian Fishing Rights issue is heartening. However, the IRS continues to press its taxation claims against Indian fishermen with a vigor. Passage of Indian Fishing Rights legislation is necessary to stop this unjust taking of tribal property. We urge you to support us in this endeavor.

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Councilman

April 6th, 1987

Honorable Daniel K. Inouye, Chairman
Senate Select Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510
Att: Alan Parker & Joe Mentor

Re: S.#727- Indian Fishing Rights Bill- Written Testimony & Support Documents from Lummi Indian Tribe.

Dear Senator Inouye:

The Lummi Indian Tribe participated in the Senate Select Committee on Indian Affairs hearing on the "Indian Fishing Rights" bill (S.#727). The record has been kept open, until noon on the 7th of April, for submitting written testimony and support documents. Please find the same attached to this correspondence. We appreciate the opportunity to submit for the record.

This document not only contains testimony from the Lummi Indian Tribe, but it has supportive resolutions and correspondence from tribes and organizations nationwide, and internationally. The document has the following sections for your review:

1. Lummi Indian Tribe's Testimony;
2. Indian Tribes- Northwest Region;
3. Indian Tribes- Far west & Southwest Regions;
4. Indian Tribes- Great Lakes States;
5. Indian Tribes- Plains Region;
6. Indian Organizations;
7. Non-Indian Organizations.

The enclosed publications document nationwide support for "Indian Fishing Rights" legislation to stop the Internal Revenue Service to apply Federal tax law to tribal fishermen's income from treaty protected waters. S.727 clarifies that Congress does not support this unjust taking of a treaty resource.

Thank You Very Much.

Respectfully Yours,

Jewell P.W. James

Jewell P.W. James, Coordinator
Treaty Protection Task Force

PREPARED STATEMENT OF DANIEL E. JORDAN

Good morning. I am Daniel Jordan, Councilmember for the Hoopa Valley Tribe of California, and with our fisheries biologists, Mike Orcutt and Bob Hannah, served as tribal representative for the Klamath River Salmon harvest allocation negotiations resulting in a five-year agreement expected to be fully ratified in mid-April.

I appreciate being given the opportunity to testify on this legislation which is extremely important to Indian tribal fishing rights and the exercise of those rights.

The Hoopa Valley Indian Reservation is the largest reservation in California. The Indian fishing areas consist of the Hoopa Square, the traditional homeland of the Hupa Tribe, and areas along the lower parts of the Klamath River, the traditional homeland of the historic Yurok Tribe. These areas were established as Indian reservations by three separate Executive Orders between 1855 and 1891. The reservation boundary status has been in constant litigation for over two decades.

The fishery resource has for thousands of years been central to the survival of the Hoopa Tribe, and has served its religious, subsistence and economic needs. For this reason, the Executive Orders created the reservations around the Trinity and Klamath Rivers.

The rights of the tribal fisheries on the Klamath and Trinity Rivers have been upheld in court cases such as Mattz v. Arnett, California v. Andrus, California v. Watt, People v. McCovey, and many others.

The Hoopa Tribe has been involved in fishery management issues for years, has its own tribal fishing ordinance and court system, and has maintained a well qualified and experienced fisheries department.

We have been very concerned about the IRS tax issue for the past few years because of its economic impact on our tribal members. The major natural resources of our reservation are timber and fisheries, and with the decline in the lumber market, the free exercise of our fishing rights becomes critical to our tribe's long term well-being.

Frankly, I was quite amazed that the IRS could overlook what we understood to be longstanding principles of interpreting Indian rights. I fully concur with the statement of Senator Adams when he said, "It is a sorry sight when the Federal Government, pledged by law to protect the treaty interests of Native American peoples, fails in that duty, and permits unwarranted legal prosecution. It is particularly unfortunate in a case like this where established principles of law so clearly favor the tribal fisherman."

The fishing right, when owned by the Tribe is not taxable; however, according to the IRS, when a tribal member exercises that right it becomes taxable. Taxation places an economic burden on the exercise of that right. If an Indian must pay to exercise the Tribe's fishing right, then that right is meaningless.

Clearly, this was the intent of neither the tribes nor the United States representatives during treaty negotiations. Having a right on the one hand, but being taxed for exercising that right on the other only, makes a mockery of the negotiation process. As it was stated by the courts in one case, "It acts upón the Indians as a charge for exercising the very right their ancestors intended to reserve."

We fully support the passage of legislation that makes it clear that income derived from exercising a reserved right is not taxable. Tribes are not fighting for what is not rightfully theirs--they are fighting to keep what little they have left of what is rightfully theirs.

We appreciate the efforts of the Senators who have taken an aggressive stand opposing the taxing of fishing income. The introduction of this legislation shows their commitment to solving rather than creating problems in Indian country.

We urge the swift passage of this legislation and pledge our support wherever needed.

Thank you.

PREPARED STATEMENT OF STANLEY G. JONES, SR.

Mr. Chairman, my name is Stanley G. Jones, Sr., I am Chairman of the Board of Directors of the Tulalip Tribes of Washington. On behalf of the Board, I would like to thank you and the Committee for this opportunity to present the views and recommendations of the Tulalip Tribes concerning S. 727, a bill to clarify the non-taxable status of income derived from the exercise of fishing rights secured by treaties and Executive Orders. We commend you and the co-sponsors for introducing this vital Indian measure.

In our view, this legislation will reaffirm the meaning and intent of the treaties entered into between the government of the United States and Washington Indian tribes in 1855 and will confirm the Federal Government's trust responsibilities under those treaties. The Tulalip Tribes recommend passage of S. 727. Its enactment will stand as a clear signal to all that the United States honors its word.

If after all these years the Internal Revenue Service, with the support of the United States Department of Justice, can arbitrarily, retroactively and unilaterally reinterpret the intent of our treaty, what faith or security can any nation have in the solemn pledges of the Federal Government?

The Tulalip Tribes of Washington are the descendants of several of the tribes and bands which signed the Treaty of Point Elliott on January 22, 1855. We have reserved treaty fishing rights under that Treaty. For centuries, fishing and hunting were central to the way of life of my ancestors. Fishing was the cultural, religious and economic mainstay of our people for centuries before the treaties. It served to give us a rich and varied life as well as a firm economic base.

We have already suffered great losses. In the treaties, we ceded large areas of land and agreed to a small reservation of 22,000 acres of land in return for our reserved fishing rights. The United States' promises that the treaties would protect that source of food and commerce in perpetuity were crucial in obtaining the tribes' agreement to the treaties. The negotiators for the United States recognized the importance of fishing to our economy, this point was stressed throughout the negotiations.

Today, with only approximately 8,000 acres left in tribal ownership to serve as a base from which to exercise our fishing rights, fishing continues as it did at treaty times to serve as the mainstay of our cultural and religious practices and our economy. When asked how many of our members are fishermen, we often say that we are all fishermen. Our children, as they grow up, learn to fish - much as we did, and, as our forefathers did.

Even for those who work at some other trade, fishing provides part of their subsistence and serves as an important cultural and religious event. For some, fishing is a part-time job. But fishing, even with more modern gear and methods, is a difficult activity. Those who make their living from fishing do so at a tremendous investment of time and effort and can ill afford to have this treaty right taxed. I speak from experience. I am a full-time fisherman and have been in the business some 40 years.

Mr. Chairman, the United States assured the tribes that the treaties would "secure" their fishing rights. Governor Stevens, the chief negotiator for the United States, stated at the time, "This paper gives you a home.... This paper secures your fish." In fact, the fishery is the principal economic resource reserved under the treaties by Western Washington tribes. The vital economic importance of the fishery to us has not diminished with the passage of time.

On the Tulalip Reservation, and on other reservations throughout the Northwest, fishery income often supports an extended family. Brothers, sisters, cousins, nephews and nieces may spend some or all of their time engaged in fishing. We wish to encourage this since it continues our way of life and provides a means of livelihood free from government welfare programs.

Historically, both the tribes and the United States have recognized that treaty fishing income is not subject to taxation. In 1942, the Supreme Court of the United States agreed with us that a state cannot impose a charge upon the exercise of our fishing right and held that the treaty prohibited this. The same principle applies to the United States. The Solicitor of the Department of the Interior recently reaffirmed the long-accepted understanding that treaty fishing income is not subject to Federal taxation. Indeed, until its recent policy reversal, the Internal Revenue Service historically did not apply the Federal income tax to treaty fishing income.

Frankly, we were caught by surprise when the IRS began to try to collect tax on our income from treaty fishing. Our ancestors helped the United States achieve peace in the Northwest Territory during treaty times. The United States made a bargain with us. The action of the IRS makes us feel a deep sense of betrayal. We have always believed, and continue to believe, that the United States Government acted in good faith when it promised our forefathers that the fishing rights would not be impaired in any way.

Let me say here that as co-managers of the fishery we are accutely aware of and believe in the necessity of assuring conservation of the resource. We also believe, and S. 727 will reaffirm, that Congress did not intend to abrogate any part of the treaties when it passed the Internal Revenue Code.

In our opinion, the honor of the Nation is involved in this issue. We urge that the Internal Revenue Service's approach to dealing with treaty commitments and trust responsibilities be strongly rejected. All Federal agencies, including the Internal Revenue Service, share the Federal trust responsibility to protect the tribes' treaty fishing rights. If the approach of the IRS in this matter is adopted, all treaty rights and trust resources will be in danger.

Speaking of the Federal trust responsibility, let me point out that over the past years we have seen many government welfare and jobs programs come and go. The most cost-effective job program to encourage economic self-sufficiency among our people is to sustain our treaty fishing right free from government taxation. President Reagan in his Indian Policy Statement of January 24, 1983, highlighted the importance of economic development and self-sufficiency and mentioned fishing as an avenue to tribal economic development.

The Internal Revenue Service and the Justice Department seem to have placed themselves over and above the stated policy of the President. A Federal income tax on our fishery income would drive some of us out of business. Many of our members currently pay a tribal tax on their earnings from fishing activities and imposition of a Federal income tax on those same activities would greatly impair our ability as a tribal government to impose and collect a tribal tax which is an important source of income to our tribal governments. This income goes to support search and rescue, marina maintenance, fisheries patrol and fisheries enhancement.

The Tribes would like to see the legislative history of S.727 include ample discussion on the scope of fishing activities protected from federal taxation by the treaties. Also, given the limited time we have had to study the bill, we have not determined whether amendments are needed from our perspective. I am, therefore, directing our legislative consultant and legal counsel to work with the Committee staff on both matters. In addition, our counsel will soon submit to the Committee, on behalf of the Tribes, a legal memorandum with appropriate attachments on the IRS policy to tax treaty fishing income.

Mr. Chairman, I want to emphasize in closing that Northwest Indian tribes paid a heavy price in the bargain they struck with the Federal Government by giving up millions of acres of their traditional homelands. Our forefathers believed the treaties secured our fishing rights for all time. We modern-day leaders share that belief as well. But now the IRS in concert with the Justice Department seeks to rewrite history and reinterpret the treaties by declaring the treaty right to be fair game for a Federal tax. We urge this Committee to move quickly for enactment of S.727 to uphold the integrity and word of the Federal Government in the treaties under consideration here as well as those affecting other tribes across the country.

Thank you.

PREPARED STATEMENT OF MASON D. MORISSET

Mr. Chairman and Committee members, I appreciate the chance to appear before you today in support of S. 727 concerning the taxation of income derived from the exercise of federally protected fishing rights by American Indians.

Over the years it has been my privilege to represent Indian tribes and individual Indians as legal counsel in fishing and taxation litigation throughout the country. In these endeavors one message has always been loud and clear: The Indians fervently believe that promises made to them by the Government through treaties, congressional acts, and executive orders preserving their fishing rights included the promise that the government would not tax the exercise of that right.

Despite universal belief that such an assurance was implied in governmental recognition of their rights. The Internal Revenue Service has, in recent years, accelerated attempts to tax the exercise of these rights. In my view this is a direct contradiction of promises made in treaties, executive orders and congressional acts. It is to set the record straight that S. 727 has been introduced.

1. Fishing Rights Were Preserved by Treaty, Act of Congress and Executive Order

At the outset we should note that Government assurances preserving fishing rights have come in many forms. One of the most familiar forms is by treaty between the United States Government and the governing chiefs of the various tribes and bands. However, the factual pattern of promises made throughout our nation is somewhat more complex. In many instances documents designated as "treaties" were signed with chiefs and headmen only never to be formally ratified by the Senate either through inaction or in-attention or due to technical changes in the law. Thus, promises were made to tribes concerning their fishing rights which were ultimately recognized through one of three mechanisms: a formal treaty, an act of Congress, or an executive order setting aside a reservation for a particular tribe or tribes. Therefore, any legislation which addresses this problem should include the recognition of this historical fact.

2. Fishing Rights Are to be Freely Exercised

The treaties, statutes, and executive orders that we are concerned with have been construed to protect fishing rights of tribes. The courts have made it clear that those rights are to be free from governmental interference save for two instances; namely, regulation to meet conservation needs and regulation to achieve a proper allocation of the harvestable resource. See e.g., Washington v. Passenger Fishing Vessel Association, 443

U.S. 658 (1979).

Additionally the courts have recognized the importance of the fishing right and that the tribes did not grant the power to tax treaty rights. *Mason v. Sams*, 5 F. 255 (W.D. Wash. 1955). And certainly state attempts to tax treaty fishing rights by imposing a tax and license fee upon tribal members were opposed by the United States and were struck down by the Supreme Court as an impermissible infringement upon treaty secured rights. *Tulee v. Washington*, 315 U.S. 681 (1941).

We think it clear that the understanding of the Indians who negotiated the treaties must govern their meaning. The Supreme Court has ruled on this many times, most recently in the appeal of the "Boldt" decision dealing with Northwest treaty tribes. There the court held that the understanding of the Indians must control.

> [This court] has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. [T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

Washington v. Passenger Fishing Vessel Association, 443 U.S. 658, 675-76 (1979).

3. *Recognition of Exemption by the Government*

The courts of the United States and the Executive Branch early recognized that general laws of the United States should not apply to Indians unless Congress made a specific reference to such application. Thus, in Elk v. Wilkins, 112 U.S. 94 (1884) the court stated:

> General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them.

In 1912 in the case of Choate v. Trapp, 224 U.S. 665 (1912) after stating the general rule that exemptions from taxation are to be strictly construed, the Supreme Court nevertheless noted:

> But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than 100 years and has been applied in tax cases.

Early opinions of the United States Attorney General also held these views. After quoting the language noted above from Elk v. Wilkins, the Attorney General noted in a 1924 opinion:

> The Indian has always been the object of special legislation. Never has it been the practice to legislate for him generally along with the rest of the people. 34 Ops. Atty. Gen. 439 (1924).

And again in 1925 the Attorney General noted:

> The principle was emphasized that general acts of

> Congress do not apply to Indians unless so worded as to manifest a clear intention to include them; that Indians have always been the object of special legislation, and that general legislation, and especially revenue laws, which burden and restrict the use and enjoyment of property, should not be applied to Indians, unless Congress in clear and unambiguous language so directs. 35 Ops. Atty. Gen. 1 (1925).

From these expressions it is clear that the courts and administrative agencies of the government were of the opinion that tax laws should not generally apply to Indians particularly in the face of treaties reserving certain rights to those Indians. Nevertheless the Internal Revenue Service has chosen to accelerate its efforts to exact income taxes from treaty reserved fishing rights in contravention of these rules.

4. Court Consideration of Fishing Income

In the case of fishing no federal court other than the tax court has ever clearly addressed this issue. In 1946 the tax court held fishing income from a Quinault Indian fishing on the reservation to be taxable. "Charles Strom", 6 T.C. 621 (1946). This was affirmed per curiam by the Ninth Circuit without any significant independent analysis. Strom v. Commissioner, 158 F.2d 520 (9th Cir. 1947).

Not until recent times was there any significant activity in the area of taxation of reserved fishing rights. Then in 1982 in the case of Earl v. Commissioner, 78 T.C. 1014, (1982), the tax court held that income of a Puyallup Indian gained from working as a cook on a non-Indian vessel was taxable as treaty fishing income. This case continues to be cited as precedent by the tax courts and by the Internal Revenue Service. This is an example of the lengths to which the IRS will go to continue its attempts to tax Indians. Earl is not even clearly a treaty fishing rights income case since the taxpayer was working as a cook on a non-Indian vessel which was fishing outside the usual and accustomed fishing places of his tribe. Secondly, Earl was not represented by counsel. Despite the fact that the taxpayer appeared pro se and there was very little analysis of the treaty fishing right, the tax court used the opportunity to attempt to establish a binding precedent and the IRS has been only too willing to accept the case in that light.

5. Interference With Tribal Government

One important aspect of treaty fishing rights cases such as the "Boldt" decision is the recognition of tribal self-government. In my view, federal taxation of fishing activity runs directly counter to the needs of tribal self-government.

In the Boldt decision the Federal District Court recognized the self-governing aspects of Indian tribes and charged them with substantial authority and responsibility to manage the fisheries resource and harvest by tribal fishermen. Thus, for example, a comprehensive fisheries management plan has been adopted by the court which requires the tribes to carry out governmental fisheries regulatory and management functions. 459 F. Supp. 1020, 1107 (1978). While receiving some assistance to carry out these functions many tribes also tax fishing activity to help support the infrastructure necessary to carry out their responsibilities. Clearly taxation by the Federal Government places an additional burden on the fishermen which they can ill afford.

6. Statutory Language

We want to stress the importance of and the need for legislation to be precise enough to clearly direct the Internal Revenue Service. We cannot count on the Service to give the benefit of the doubt to Indian tribes or tribal members. This is well illustrated by a recent private letter ruling in 1982 by the Service that income earned from the sale of fish grown on a trout farm on individual trust land was not "directly derived from the land and thus was taxable as ordinary income". Despite the clear ruling of Squire v. Capoeman, 351 U.S. 1 (1956) and derivative cases as to the non-taxability of crops grown on trust land, and the clear analogy from that to fish grown in "trust water", the Service was unwilling to extend the reasoning of Squire v. Capoeman to the fishing situation. Thus, we think it clear that this legislation leaves no loop holes for the IRS to use in its quest to tax the fishing right.

We assume that the legislation includes the following concepts:

1) The term "Indian" includes a duly enrolled member of an Indian Tribe, and any corporation, partnership or other business entity one hundred percent (100%) owned by such Indian.

2) The legislation covers all "fishing activity" and the term "fishing activity" includes the harvest or capture, by net, hook, spear, traps or weirs of fish, shellfish and other marine species including assisting another Indian in such activity, where such fishing activity takes place within the exterior boundaries of a federally recognized Indian reservation or at usual and accustomed places within or without an Indian reservation. Fishing activity further includes buying, selling and re-selling fish or fish products to a processor, warehouse, trader, exporter, retailer or ultimate consumer when such activity is undertaken by an Indian or Indian Tribe.

3) The terms "usual and accustomed places" includes all places, grounds, stations, sites and locations secured to Indians by treaty, executive order or congressional act for the benefit of Indians.

4) The term "assisting" includes an Indian working as a crew member on a boat or vessel owned by an Indian or Indian Tribe, and working as an employee of an Indian or Indian Tribe when engaged in a fishing activity.

5) The term "Indian Tribe" means federally recognized Indian Tribe with fishing rights secured by treaty, executive order or congressional act, and includes business entities such as corporations, partnerships and joint ventures one hundred percent (100%) owned by such tribes.

6) The legislation applies retroactively.

7) Further, we believe that the Internal Revenue Service should be required officially to notify affected Tribal Governments and the congressional committees responsible for American Indian issues, if the income of American Indian Tribal members derived from a resource secured by treaty, executive order or congressional act is under consideration for federal taxation.

7. The Precedent for Congressional Clarification

Finally, we note that this is not the first time that it has been necessary to ask the Congress to clarify the protected nature of reserved tribal rights. In the case of distributions of tribal income from tribal assets distributed per capita to tribal members, the Internal Revenue Service decided in Revenue Ruling 67-284 that such tribal income would be includable in the gross income of an Indian tribal member when distributed to him. It was necessary for the Congress to set this matter straight in Pub. L. 98-64 (1983). That act of Congress made it clear that where funds are held in trust by the Secretary of the Interior for an Indian tribe, and those funds are distributed per capita to tribal members, then the per capita distributions will be treated as tax exempt upon distribution. This should have been clear to the IRS but required a congressional directive to make it so. It appears that once again, we must ask Congress to clarify matters.

Thank you, Mr. Chairman. I would be glad to answer any questions you may have.

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

September 21, 1983

Memorandum

To: Assistant Secretary--Indian Affairs

From: Solicitor William H. Coldiron

Subject: Federal income taxation of Stevens treaty fishing income

You have asked my opinion as to whether the income of members of certain Washington State treaty tribes generated from commercial fishing pursuant to the treaties is subject to the federal income tax. It is my opinion that fishermen who are members of tribes that have established treaty rights [1] are exempt from federal income tax on fishing income earned pursuant to those treaties. This opinion does not apply to income earned by these same fishermen from other sources, such as fishing in nontreaty areas or to income derived from fish in excess of 50% of the available take. This opinion applies only to the federal income tax and does not apply to any other federal tax, excise, fee or license of any kind whatsoever. This opinion does not apply to State taxation in any form.

Your request for my opinion was, I understand, prompted by recent enforcement efforts of the Internal Revenue Service directed toward members of the Lummi, Tulalip, Puyallup and Swinomish Tribes [2] and seeking to collect taxes on treaty fishing income. The Internal Revenue Service, of course, has responsibility for the interpretation and enforcement of the federal income tax laws. However, this Department has the primary responsibility within the federal government for the protection of Indian treaty fishing rights, including the authority and responsibility to interpret those rights. Accordingly, I believe it is not only appropriate but necessary that I interpret the treaties in this instance, where the interpretation of the federal tax laws under which the IRS is proceeding may conflict with fishing rights guaranteed under the treaties.

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[1] United States v. Washington 384 F.Supp. 312 (W.D. Wash. 1974), aff'd 520 F.2d 676 (9th Cir. 1975) cert. denied, 423 U.S. 1086 (1976); United States v. Washington, 459 F.Supp. 1020 (W.D. Wash. 1978); Puget Sound Gillnetters Ass'n v. U.S. District Court, 573 F.2d 1123 (9th Cir. 1978); Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

[2] In addition to these tribes, other tribes with treaty rights in Washington include the Hoh, Makah, Muckleshoot, Nisqually, Quileute, Quinault, Sauk-Suiattle, Skokomish, Squaxin Island, Stillaguamish, Upper Skagit, Nooksack, Suquamish, Port Gamble Band of Clallam Indians, Lower Elwha Tribal Community, Jamestown Band of Clallam Indians and the Yakima Indian Nation. A number of Oregon and Idaho Indian tribes have similar treaty fishing rights.

At the outset, I recognize that the only two decided cases on this issue have found that treaty fishing income is subject to the federal income tax. Strom v. Commissioner, 6 T.C. 621 (1946), aff'd per curiam, 158 F.2d 520 (9th Cir. 1947); Earl v. Commissioner, 78 T.C. 1014 (1982). However, as more fully discussed below, both decisions suffer from a lack of adequate consideration of the treaty rights involved. The Strom case was decided prior to both the United States v. Washington series of cases, which comprehensively interpreted the treaty fishing rights for the first time, and the Supreme Court's decision in Squire v. Capoeman, 351 U.S. 1 (1956), now the controlling case on questions of federal taxation of Indian trust and treaty income. The Earl case was brought pro se by an individual Indian fisherman, who never presented the court with the appropriate arguments on his own behalf. I do not believe therefore that these cases may be considered dispositive of the issue.

The Treaties

The treaties relevant to this issue are the six treaties negotiated by Governor Stevens in the 1850's with tribes in Washington State. 3/ Governor Stevens negotiated these treaties in order to clear title to the lands then in the Territory of Washington. The tribes and bands in Washington ceded title to vast areas of land in exchange for small reservations and various other guarantees. With immaterial variations, the treaties each provide:

3/ Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132; Treaty of Point Elliott, January 22, 1855, 12 Stat. 927; Treaty of Point No Point, January 26, 1855, 12 Stat. 933; Treaty of Neah Bay, January 31, 1855, 12 Stat. 939; Treaty with the Yakimas, June 9, 1855, 12 Stat. 951; Treaty of Olympia, July 1, 1855 and January 25, 1856, 12 Stat. 971.

> The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; . . .

Article 4, Treaty of Point No Point, 12 Stat. 933.

This reservation of a right to fish has been interpreted seven times by the United States Supreme Court. United States v. Winans, 198 U.S. 371 (1905); Seufert Bros. Co. v. United States, 249 U.S. 194 (1919); Tulee v. Washington, 315 U.S. 681 (1942); Puyallup Tribe v. Department of Game (Puyallup I), 391 U.S. 392 (1968); Department of Game v. Puyallup Tribe (Puyallup II), 414 U.S. 44 (1973); Puyallup Tribe v. Department of Game (Puyallup III), 433 U.S. 165 (1977); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n (Fishing Vessel), 443 U.S. 658 (1979). These decisions establish the treaty right of the Indians to fish at their usual and accustomed places free of state regulation except where necessary for purposes of conservation and their right to take up to 50% of the available fish.

The fishing rights reserved by the Indians in the treaties included not only the right to fish for subsistence purposes but the right to fish for commercial purposes. At the time of the treaties, the Indians fished commercially, as recognized by the Supreme Court: "Fish constituted a major part of the Indian diet, was used for commercial purposes and indeed was traded in substantial volume." Fishing Vessel, supra, 443 U.S. at 665. Quoting from the district court's opinion, the Court described the Indians' reliance on fish for commercial purposes in more detail:

> "At the time of the treaties, trade was carried on among the Indian groups throughout a wide geographic area. Fish was a basic element of the trade. There is some evidence that the volume of this intra-tribal trade was substantial, but it is not possible to compare it with the volume of present-day commercial trading in salmon. Such trading was, however, important to the Indians at the time of the treaties. In addition to potlatching, which is a system of exchange between communities in a social context often typified by competitive

> gifting, there was a considerable amount of outright sale and trade beyond the local community and sometimes over great distances. In the decade immediately preceding the treaties, Indian fishing increased in order to accommodate increased demand for local non-Indian consumption and for export, as well as to provide money for purchase of introduced commodities and to obtain substitute non-Indian goods for native products which were no longer available because of the non-Indian movement into the area. Those involved in negotiating the treaties recognized the contribution that Indian fishermen made to the territorial economy because Indians caught most of the non-Indians' fish for them, plus clams and oysters."

443 U.S. at 665-666, n.7. The Court went on to find that, "During the [treaty] negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and [Governor Stevens'] promises that the treaties would protect that source of food and commerce was crucial in obtaining the Indians' assent." 443 U.S. at 676. The Supreme Court's conclusion that the treaty reserved to the Indians a right to take up to 50% of the available fish incorporates the Court's recognition of the role of fish in the Indians' economy and its recognition that the treaty negotiators understood that role and intended that the right to fish commercially was to be included in the rights reserved to the Indians.

Other Supreme Court decisions have held that the State of Washington could not require an Indian exercising off-reservation fishing rights to purchase a state fishing license, *Tulee v. Washington*, *supra*, and that the state's regulatory authority over treaty fishing was limited to that regulation reasonable and necessary for conservation. *Tulee*, *Puyallup I*, *Puyallup II*.

The United States, a direct party to the treaties, is of course bound by them and, absent exercise by Congress of its power to abrogate treaties, is subject to limitations similar to those imposed on the state with regard to the Indians' treaty rights. *United States v. Winans*, *supra*, 198 U.S. at 381-382; *Hoh Indian Tribe v. Baldridge*, 522 F. Supp. 683 (W.D. Wash. 1981).

The Tax Cases

In Squire v. Capoeman, 351 U.S. 1 (1956), the leading case on federal taxation of Indian income, the Supreme Court considered whether capital gains from the sale of standing timber on allotted lands was subject to the federal income tax. The Court held that the General Allotment Act of 1887, 24 Stat. 388, created an exemption from the tax in the circumstances before it. In reaching its conclusion, the Court acknowledged that the General Allotment Act did not contain an express exemption from the tax but nonetheless inferred an exemption from the government's undertaking, expressed in section 5 of the act, 25 U.S.C. §348, to convey the allotment at the end of the trust period "free of all charge or incumbrance whatsoever" and a 1906 amendment to section 6 of the act, 25 U.S.C. §349, which provides for removal of "all restrictions as to . . . taxation" after issuance of a fee patent. 351 U.S. at 6-8. The Court also found that the tax exemption was necessary to fulfill the purpose of the allotment system "to protect the Indians' interest and 'to prepare the Indians to take their place as independent, qualified members of the modern body politic.'" 351 U.S. at 9.

The Court responded thus to the government's argument that the case should be treated as an ordinary tax case:

> We agree with the Government that Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens. We also agree that, to be valid, exemptions to tax laws should be clearly expressed. But we cannot agree that taxability of respondents in these circumstances is unaffected by the treaty, the trust patent or the Allotment Act.

351 U.S. at 6.

While the Court acknowledged that a tax exemption must be clearly expressed, it found the necessary clear expression in language which, as noted above, implied, rather than expressly stated, the exemption. 351 U.S. at 6-8. It did so by reference to the intent of Congress in the General Allotment Act, 351 U.S. at 7-8, and to the principle of treaty and statutory construction which the Court described thus:

> Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. Hence, in the words of Chief Justice Marshall, "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense." [Citations omitted]

351 U.S. at 6-7. 4/

The Court in Capoeman held that the taxes from which the General Allotment Act was intended to shield allotments during the trust period included the federal income tax,

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4/ This same rule was called upon by the Supreme Court in Fishing Vessel when it discussed the necessity of interpreting the Stevens treaties in accord with the intent of the parties:

> [I]t is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule. It has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. "[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." This rule, in fact, has thrice been explicitly relied on by the Court in broadly interpreting these very treaties in the Indians' favor. [citations omitted]

443 U.S. at 675-676.

even though that tax was not in existence at the time the General Allotment Act and its 1906 amendment were enacted. 351 U.S. at 7-8. The Court also rejected the argument put forth by the government that taxation of income derived from an allotment was sufficiently distinct from direct taxation of the allotment to make income taxation permissible even if direct taxation were prohibited. *See* 351 U.S. at 6.

Lower court decisions following *Capoeman* have established that the tax exemption in the General Allotment Act applies as well to allotments made under other allotment acts even though those acts do not necessarily contain the exemptive language of the General Allotment Act. *Big Eagle v. United States*, 300 F.2d 765 (Ct.Cl. 1962); *United States v. Hallam*, 304 F.2d 620 (10th Cir. 1962); *Stevens v. Comm'r*, 452 F.2d 741 (9th Cir. 1971). The courts reasoned that the other allotment acts had the same purpose as the General Allotment Act 5/ and therefore the same tax exemption should apply. These decisions recognize the essential *Capoeman* holding as founded upon the purpose of the General Allotment Act rather than upon the presence of specific language.

Other lower court decisions which have addressed the extent of the General Allotment Act exemption have held that income earned by an Indian from land purchased and placed in trust for him under §5 of the Indian Reorganization Act, 25 U.S.C. §465, shares the tax exemption, *Stevens v. Comm'r*, *supra*, but that income earned by an Indian from tribal or other Indians' trust land does not. *Holt v. Comm'r*, 364 F.2d 38 (8th Cir. 1966), *cert. denied*, 386 U.S. 931; *Fry v. Comm'r*, 557 F.2d 646 (9th Cir. 1977), *cert. denied*, 434 U.S. 1011; *United States v. Anderson*, 625 F.2d 910 (9th Cir. 1980), *cert. denied*, 450 U.S. 920. The courts in these latter cases viewed the purpose of the General Allotment Act as one to protect the allottees' property from encumbrance during the trust period, a purpose which would not be infringed by taxation of an Indian's income from other than his own trust property. Thus, while holding the income at

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5/ The Court of Claims stated in *Big Eagle*, "Parallel congressional purposes [between the General Allotment Act and the Osage Allotment Act] are apparent, but the basic purpose is the one alluded to in *Capoeman* and that is to protect the property so that it will adequately serve the needs of the ward and finally bring him to a state of competency and independence. This chance is encouraged, if not guaranteed, by tax exemption." 300 F.2d at 771-772.

issue taxable, these decisions recognized the relevance of the underlying purpose of a treaty or statute to the determination whether language contained therein expresses a tax exemption applicable to the particular circumstances at issue.

The courts in *Holt*, *Fry*, and *Anderson*, having found the General Allotment Act exemption inapplicable, were also unable to find any exemption in other statutes or treaties relevant to the income at issue. These decisions, as well as others, 6/ demonstrate that a tax exemption must derive from language in a treaty or statute and that an exemption may not be based on policy alone or on generalized references to treaties and statutes. *E.g.*, *Anderson*, *supra*; *LaFontaine v. Comm'r*, 533 F.2d 382 (8th Cir. 1976). While holding the particular income at issue taxable, these courts have followed the basic teachings of *Capoeman*. As the Court of Appeals for the Ninth Circuit stated in *Anderson*, that court's most recent opportunity to consider the issue,

> The rule that ambiguous statutes and treaties are to be construed in favor of Indians applies to tax exemptions, . . . but this rule "comes into play only if such statute or treaty contains language which can reasonably be construed to confer income [tax] exemptions" . . . "The intent to exclude must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject-matter." (citations omitted.)

625 F.2d at 913. Further, in response to Anderson's argument that the policy of the General Allotment Act was applicable to his income earned from land other than his own (to which the court found the GAA exemption did not extend), the court stated,

> *Capoeman* and every other Supreme Court and Ninth Circuit case have held that such policy arguments are fruitless in the absence of statutory or treaty language that arguably is an express tax exemption. Such policy arguments, however, might persuade courts to con-

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6/ *E.g.*, *Comm'r v. Walker*, 326 F.2d 261 (9th Cir. 1964) and *Jourdain v. Comm'r*, 617 F.2d 507 (8th Cir. 1980) *cert. denied* 449 U.S. 839, holding the salaries of tribal officials taxable.

> strue such arguable language, if any exists, actually to be an express tax exemption.

625 F.2d at 914, n. 6.

Analysis

Capoeman and its progeny make clear that a tax exemption must be based on treaty or statutory language, arguably creating an exemption, which is applicable to the income-producing activity at issue. Once such arguable language is identified, however, the policy or purpose of the treaty or statute may be called upon to determine whether the language does in fact create an exemption.

The language in the Stevens treaties expressly securing to the Indians the right of "taking fish at usual and accustomed grounds and stations" is such arguable language. First, it is directly applicable to the fishing activity at issue. Thus the instant situation is easily distinguishable from the taxpayers' unsuccessful attempts in Holt, Fry, and Anderson to apply the General Allotment Act tax exemption to income from land to which the General Allotment Act itself did not apply, and from attempts to infer tax exemptions from other statutory or treaty language which had no direct relation to the activity at issue. E.g., Anderson, Jourdain v. Comm'r; LaFontaine v. Comm'r. 7/

Second, the treaty provision states no limitation on the Indians' right to fish at usual and accustomed places other than that the right is to be exercised in common with citizens. On its face, the provision might well be read to prohibit any limitation on or diminishment of the fishing right other than the one specified. Of course, it might also be read

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7/ In Anderson, the Ninth Circuit rejected arguments that sections 5, 6, and 16 of the Indian Reorganization Act, 25 U.S.C. §§465, 466, 476, conferred income tax exemptions for the income of an Indian derived from other Indians' land. 625 F.2d at 915-916. In Jourdain, the Eighth Circuit concluded that a treaty provision protecting Indians from "molestation by the United States" did not preclude income taxation of a tribal official's salary. 617 F.2d at 508-509. In LaFontaine, the Eighth Circuit found that the taxpayer, while citing more than thirty treaties, was unable to point to any provision therein exempting his income from taxation. 533 F.2d at 382.

otherwise but, at the least, an ambiguity exists, sufficient to call into play the rules of construction relating to ambiguous treaty and statutory provisions. Moreover, such an ambiguity makes the language arguably a tax exemption and so requires that the purpose and policy of the treaty be examined to determine whether a tax exemption does exist.

As discussed above at pages 3-4, the right to fish under the Stevens treaties includes the right to fish commercially and thus necessarily the right to earn income from fishing. Commercial fishing under the Stevens treaties, unlike many other economic activities in which Indians might engage, is thus specifically and expressly protected from interference by the United States.

As to the understanding of the Indian treaty negotiators which, as discussed above, the Supreme Court has considered critical to the proper construction of treaties, it is no more likely that the Indians understood that the federal government would tax their fishing right than that they understood that future states would be able to impose a charge upon it. To the contrary, the Indians were assured that they would be able to fish and trade as they had prior to the treaties, *see* p. 4, *supra*, when they paid no taxes and were not required, in any other manner, to turn over a portion of their fishing catch or proceeds to the government.

Accordingly, in my view, the rules of treaty and statutory construction relied upon by the Supreme Court in *Fishing Vessel*, *Tulee*, and *Capoeman* require the conclusion that the Stevens treaties reserved to the Indians the right to fish free from taxation, including federal income taxation.

The question remains whether the later-enacted Internal Revenue Code abrogated or modified this treaty right, because Congress, unlike the state legislatures, has the power to abrogate treaties with Indians. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

In *Capoeman*, the Supreme Court concluded that the Internal Revenue Code did not modify the federal government's undertaking in the General Allotment Act to hold allotments free of taxation in order to fulfill the purpose of that Act. 8/

8/ "It is unreasonable to infer that, in enacting the income tax law, Congress intended to limit or undermine the Government's undertaking. To tax respondent under these circumstances would . . . be 'at the least a sorry breach of faith with these Indians.'" 351 U.S. at 10.

Similarly, the Internal Revenue Code, in my view, did not modify the obligation undertaken by the federal government in the Stevens treaties to recognise the fishing rights reserved to the Indians. As the Supreme Court has stated, "While the power to abrogate [treaty] rights exists . . . 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.'" (citing, *inter alia*, *Squire v. Capoeman*.) *Menominee Tribe v. United States*, 391 U.S. 404, 412-413 (1968). In *Menominee*, the Court held that a statute terminating the federal relationship with the Menominee Tribe did not abrogate the tribe's treaty hunting and fishing rights even though those rights derived from a treaty provision creating the tribe's reservation and the reservation itself was extinguished pursuant to the termination act. The Court, as it said, "decline[d] to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians." 391 U.S. at 412. The Court reiterated the principle of *Menominee* in *Fishing Vessel*, while holding that a 1930 agreement between the United States and Canada did not implicitly extinguish the Indians' treaty right. "Absent explicit statutory language," the Court stated, "we have been extremely reluctant to find congressional abrogation of treaty rights." 443 U.S. at 690.

One court has found an implied limitation upon Indian treaty hunting and fishing rights in the Eagle Protection Act, 16 U.S.C. §§668-668d. *United States v. Fryberg*, 622 F.2d 1010 (9th Cir. 1980), *cert. denied*, 449 U.S. 1004. 9/ Although the court acknowledged the lack of express language in the Eagle Protection Act abrogating or modifying the treaty, it relied upon a body of evidence in surrounding circumstances and legislative history which it believed indicated that Congress did intend that the act apply to treaty Indians, and upon the well-established principle that reasonable and non-discriminatory conservation statutes apply to treaty rights when such application is necessary to achieve the conservation purpose of the statutes. 10/ The court also noted that the modification of the Indians' hunting rights was relatively insignificant because eagles had never provided the Indians with "any commercial benefit or . . . subsistence

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9/ The Eighth Circuit reached the opposite conclusion in *United States v. White*, 508 U.S. 453 (8th Cir. 1974), stating that "it was incumbent upon Congress to expressly abrogate or modify the spirit of the relationship between the United States and the Red Lake Chippewa Indians on their native reservation." *Id.*, at 457-458.

10/ See cases cited *supra* at p. 4.

value." 622 F.2d at 1014. Rather, the court noted, the only apparent reason to hunt eagles was for religious and ceremonial purposes, and the act contained an exception permitting use of eagle specimens for religious purposes. *Id.*

The situation with respect to taxation of treaty fishing income is clearly distinguishable from that addressed in *Fryberg*. The treaty modification which would be implicated by application of the federal income tax to income from treaty fishing is significant because it would diminish the value of the right to fish commercially, a right which, as discussed above, was clearly reserved to the Indians by the treaties. In effect, it would represent a taking by the United States of a portion of the right it guaranteed to the Indians. Moreover, unlike the conservation measures addressed in *Fryberg* and the *Puyallup* cases, *supra*, at 3-4, whose effectiveness depends upon their being applicable to everyone, the federal income tax can achieve its purpose even though it does not tax every source of income. The "necessity" rationale supporting application of conservation laws to treaty rights is therefore lacking in the case of tax laws. Accordingly, under the principles of *Capoeman* and *Menominee*, absent more explicit language than is present in the Internal Revenue Code, Congress should not be deemed to have modified the Stevens treaty fishing rights nor to have limited or undermined the federal government's undertaking in those treaties.

Strom and Earl are Incorrect

As I mentioned at the outset, the only two court decisions on federal income taxation of treaty fishing income have concluded that such income is subject to tax. *Strom v. Commissioner*, 6 T.C. 621 (1946), *aff'd per curiam*, 158 F.2d 520 (9th Cir. 1947); *Earl v. Commissioner*, 78 T.C. 1014 (1982).

The *Strom* decision predated both *Squire v. Capoeman* and the *United States v. Washington* series of cases. The case involved on-reservation fishing by two members of the Quinault Tribe. The Tax Court apparently considered only Article II of the Quinault treaty, 12 Stat. 971, which authorized the setting aside of a reservation (and by implication exclusive fishing rights therein) for the Quinaults, and not the explicit language in Article III reserving off-reservation fishing rights, which is the language that, as discussed above, creates the tax exemption. 11/ In any event, the court analyzed the case by reference to two Supreme Court cases holding taxable a competent Indian's share of tribal oil and gas royalty income and an Indian's investment income. 12/

The third case relied upon by the Tax Court in *Strom*, an earlier Tax Court decision affirmed by the Tenth Circuit, held that an Indian's restricted land and income therefrom was subject to the federal estate tax. 13/ In light of *Capoeman* and subsequent decisions, this case is not presently followed by the IRS. *See* Rev. Rul. 69-164, 1969-1 C.B. 220.

Applying these three cases, the Tax Court made several statements in support of its conclusion which, after *Capoeman* and *Fishing Vessel*, are unpersuasive. First, the court stated that there was no express exemption from tax in the treaty. As discussed above at pp. 5-9, we now know from *Capoeman* and its progeny that a tax exemption, although it must derive from specific language in a treaty or statute, need not be expressly couched in terms of nontaxability. Second, the court considered it significant that the fishing income at issue was in the "untrammeled possession" of the petitioners.

11/ Although the Article III language ostensibly applies only to off-reservation fishing, the Supreme Court held in *Fishing Vessel* that it also applies to on-reservation fishing, to the extent, at least, that the Indians' on-reservation catch counts in their 50% allocation. 443 U.S. at 687.

12/ *Choteau v. Burnet*, 283 U.S. 691 (1931); *Superintendent of Five Civilized Tribes v. Comm'r*, 295 U.S. 418 (1935). Both cases were distinguished by the Supreme Court in *Capoeman*, 351 U.S. at 9 and n.19. At the time *Strom* was decided, the Supreme Court appeared headed toward a rule that all or essentially all Indian income was taxable, a clear change of direction from the earlier understanding, derived from administrative rulings, that no Indian income from tribal or allotted lands was taxable. It was not until ten years after *Strom* that the Supreme Court in *Capoeman* limited the scope of the *Choteau* and *Superintendent* holdings and signalled a return of the pendulum to a point between the two extremes. For an historical analysis of the tax cases, *see* Putzi, "Indians and Federal Income Taxation," 2 N.Mex. Law Rev. 200 (1972); Fiske and Wilson, "Federal Income Taxation of Indian Income from Restricted Lands," 10 Land and Water Law Rev. 63 (1975).

13/ *Landman v. Comm'r*, 42 B.T.A. 958 (1940) *aff'd* 123 F.2d 787 (10th Cir. 1941) *cert. denied* 315 U.S. 810.

Capoeman sets no requirement that income from allotments (as distinguished from the allotments themselves) must be in restricted status in order to be tax exempt. Third, although it conceded that the federal government could not directly tax exercise of the fishing right, the court concluded that the government could tax income from fishing because a tax on income was not a burden on the fishing right. As discussed above at p. 7, the same distinction between a direct tax and a tax on income was argued by the government in Capoeman and rejected by the Supreme Court. Moreover, after Fishing Vessel, it is clear that the fishing right reserved by the treaties encompassed the right to sell fish, so that an income tax is, in fact, a burden on the fishing right. See supra, at pp. 10-11. Finally, the court appears to have premised its conclusion in part upon an error of fact, in that it apparently believed that the Indians at treaty time had not engaged in substantial commercial fishing. The court stated, for instance, "It is a far cry from the fishing operations of the members of an uncivilized tribe of Indians at the time of the execution of this treaty, and the commercial fishing business now carried on by the petitioners." 6 T.C. at 627. As we now know, however, the treaty Indians did in fact rely heavily upon fish for commercial purposes. See supra at 3-4.

In my view, the law as it has developed since Strom and the facts about Indian fishing that have come to light since Strom have undermined that decision so completely that it must now be considered unsound precedent.

Earl v. Comm'r, supra, is a 1982 Tax Court decision which reached the same conclusion as Strom. For a number of reasons, I do not believe it is persuasive authority. First, the opinion reflects the fact that the petitioner, who had no attorney, was unable to present the court with an adequate analysis of the treaties. It could not be expected, of course, that the Tax Court, which normally does not interpret treaties, would have, on its own, any appreciable familiarity with the long and complex litigation involving the Stevens treaties. Consequently, although the court briefly alluded to the lower court decisions in United States v. Washington, it failed to even mention Fishing Vessel or any of the other Supreme Court decisions interpreting the treaties and also failed to demonstrate an understanding of the principles of those cases.

Further, the Tax Court, as might be expected, relied heavily on Strom, which is, in my view, no longer good law. The court also interpreted Capoeman as essentially limited to its facts, contrary to the interpretation given that case by the federal courts of appeal. *See* discussion, *supra*, at pp. 7-9. Evidently, it was this interpretation of *Capoeman* that led the court to conclude that because the petitioner's fishing rights were not individually owned in the sense an allotment is individually owned, there could be no tax exemption. The court cited *Fry*, *Anderson* and other cases discussed *supra* at pp. 7-9 as support for that interpretation, based on the holdings in those cases that, in the circumstances at issue, income earned by Indians from tribal land was not exempt. The basis for those decisions, however, as discussed above, was not that income from tribal property is *ipso facto* taxable, but that the General Allotment Act exemption did not apply and, second, that no other exemption could be found in treaty on statute. The second basis for those decisions makes them inapplicable to treaty fishing income, for which an exemption is found in the treaties. For these reasons, particularly the lack of treaty analysis, I do not consider the *Earl* decision authoritative.

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

MAR 12 1985

BIA.IA.0177

MEMORANDUM

To: Secretary

From: Solicitor

Subject: Federal income taxation of Stevens treaty fishing income--Response to IRS opinion of November 23, 1983

You have asked me to comment on the legal arguments made in an opinion of the Office of Chief Counsel, Internal Revenue Service, dated November 23, 1983. The IRS opinion was issued in response to Solicitor Coldiron's memorandum of September 21, 1983, which expressed his view that income earned by members of certain Washington State treaty tribes in the exercise of their treaty fishing right is not subject to federal income taxation. The Internal Revenue Service takes the position that such income is subject to federal income taxation.

I have already conveyed to you my reconfirmation of Solicitor Coldiron's 1983 opinion. In my view, the principal weakness of the IRS response to that opinion is its misapprehension of the Supreme Court's holding in *Squire v. Capoeman*, 351 U.S. 1 (1956). The IRS considers *Capoeman* to require an *express* exemption from federal tax. However, the General Allotment Act, which the Supreme Court construed in *Capoeman* to have created a tax exemption for income from the sale of timber on allotted land, did not contain such a tax exemption in explicit terms. The Court inferred an exemption from the government's undertaking, expressed in section 5 of the act, 25 U.S.C. § 348, to convey the allotment at the end of the trust period "free of all charge or incumbrance whatsoever" and a 1906 amendment to section 6 of the act, 25 U.S.C. § 349, which provides for removal of "all restrictions as to . . . taxation" after issuance of a fee patent. That language, construed in conjunction with the underlying purpose of the General Allotment Act, *i.e.*, "to protect the Indians' interest and 'to prepare the Indians to take their place as independent, qualified members of the modern body politic'", was sufficient, the Court held, to constitute the clear expression necessary to create a tax exemption. 351 U.S. at 6-9. *See* our 1983 opinion at 5-7.

The Internal Revenue Service takes the position that the policy underlying the Stevens treaties is not relevant to the determination of whether the treaties created a tax exemption. In so doing, the IRS ignores the practice established by the Supreme Court in Capoeman and followed consistently by the lower courts. That practice requires the identification of language in a treaty or statute which is arguably a tax exemption but then allows consideration of the underlying purpose of the enactment for the purpose of interpreting the arguable language to determine its tax exemption effect. The practice is discussed at some length in our 1983 opinion at pages 5-9. The proper role of policy in tax exemption analysis was succinctly described by the Ninth Circuit in United States v. Anderson, 625 F.2d 910 (9th Cir. 1980) cert. denied, 450 U.S. 920:

> Capoeman and every other Supreme Court and Ninth Circuit case have held that . . . policy arguments are fruitless in the absence of statutory or treaty language that arguably is an express tax exemption. Such policy arguments, however, might persuade courts to construe such arguable language, if any exists, actually to be an express tax exemption.

625 F.2d at 914, n.6. IRS quotes this statement from Anderson for the proposition that express exemptive language in a treaty a statute is required. IRS opinion at 6-7. It misses, however, the real thrust of the statement, which is that policy may indeed be examined to assist in the determination of whether arguable language is an express exemption.

In a recent decision, the Ninth Circuit demonstrated that it is still of the view that the purpose of a statute is relevant to the determination of whether a tax exemption is present. That court held in Karmun v. Commissioner, 749 F.2d 567 (9th Cir. 1984), that income from the sale of reindeer or reindeer products by Alaska natives was not exempt from federal income tax because the Reindeer Act, 25 U.S.C. §§ 500-500n, did not contain a clear expression of intent to exempt. The court considered, inter alia, the purpose of the Reindeer Act, which it found to be the provision of a continuing food source to the Eskimos of northwestern Alaska through the establishment of a native-operated reindeer industry. The court concluded, "That purpose is not undermined by requiring the owners and operators of the reindeer herds to pay federal income taxes on their profits from the successful conduct of such operations." 749 F.2d at 570.

Thus, it is amply clear that past and present judicial analysis requires a consideration of the underlying purpose of the Stevens treaties in order to determine whether the language in the treaties which secures a fishing right to the tribes creates a tax exemption. To conclude that the "right of taking fish" does not include a tax exemption, without any attempt whatsoever to determine the scope of the fishing right intended by the parties to the treaties, would directly contravene the well-established principles of the tax cases. Authoritative judicial analysis of the scope of the treaty right is readily available in the well-developed body of law culminating in the Supreme Court's decision in Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n (Fishing Vessel), 443 U.S. 658 (1979). In my view, there is neither a legal basis nor a practical justification for ignoring this body of law, as IRS does. [1]

The treaty cases and their relevance to the tax exemption issue are discussed in our 1983 opinion at 2-4 and 9-12. One case cited in that opinion warrants some further mention. In Tulee v. Washington, 315 U.S. 681 (1942), the Supreme Court held that the State of Washington was precluded from imposing a license fee upon Indians engaged in the exercise of their Stevens treaty fishing right. In striking down the fee, the Court stated that it "acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve" and "that such exaction of fees as a prerequisite to the enjoyment of fishing . . . cannot be reconciled with a fair construction of the treaty." 315 U.S. at 685.

Tulee involved a state license fee and not a federal tax. The rationale of that case, however, is relevant to any tax which would diminish the value of the treaty right because any such tax would necessarily be a "charge" for exercising the right. An income tax, in fact, might well be a more onerous burden on the right, because greater in amount, than a license fee would be. Further, the fact that an income tax does not fall directly upon the fishing activity but upon income therefrom is, under Capoeman, irrelevant if the treaty precludes taxation of the fishing right. [2] See 1983 Solicitor's opinion at 7.

Another concern I have with the IRS opinion is its heavy reliance on Strom v. Commissioner, 6 T.C. 621 (1946), aff'd per curiam, 158 F.2d 520 (9th Cir. 1947) and Earl v. Commissioner, 78 T.C. 1014 (1982). For the reasons discussed in our 1983 opinion at 12-15, I believe that Strom has been effectively eroded by subsequent case law and that Earl is seriously flawed. While these two Tax Court cases are clearly relevant to the present issue, they cannot be considered controlling because they are completely inadequate in treaty analysis.

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[1] IRS simply dismisses it: "The non-tax cases which are cited by Interior are, in our view, inapposite to the issue considered herein." IRS opinion at 10.

[2] The State of Washington recognizes that treaty fishermen are immune, even though not expressly exempted, from a state fish sales tax. See Washington Dept. of Fisheries v. DeWatto Fish Co., 660 P.2d 298, 301 (Wash. Ct. App. 1983). Such a tax, of course, is one which, like an income tax, would attach after exercise of the fishing right and would not therefore be a prerequisite to exercise of the right.

As explained in our 1983 opinion at page 4, the United States, absent exercise by Congress of its power to abrogate treaties, is subject to the same limitations as the states with regard to the Indians' treaty rights.

I can understand that, from the perspective of the IRS, this matter may appear to be solely a tax issue, with respect to which Tax Court decisions might be considered controlling and federal tax cases might constitute the sole appropriate body of law by which to analyze the issue. This is not only a tax issue however; it is also an Indian treaty issue. There are two bodies of law which must be considered in relation to each other. The controlling cases here are not the two Tax Court cases but the two Supreme Court cases, Capoeman and Fishing Vessel, which represent the paramount authority in those two bodies of law. A proper analysis of the issue should begin with those cases and must relate the two bodies of law in proper perspective. This, IRS simply has not done.

I am somewhat concerned with some erroneous statements made in the IRS opinion about positions taken in our 1983 opinion. I point these out primarily for clarification purposes.

The IRS opinion states at page 6 that our 1983 opinion "argues that Interior Department's policies of promoting optimal land use on Treaty land with a goal towards eventual Indian economic independence precludes taxation of the fishing income earned by enrolled Tribal members." The 1983 opinion contains no such statement. Nor does it take the position, as the IRS opinion implies, that policy, standing alone, is a sufficient basis for a tax exemption. Our position on the proper role of policy is discussed above and at pages 5-9 of the 1983 opinion.

The IRS opinion states at pages 7-8 that "Interior's memorandum also places substantial reliance on the Ninth Circuit's statement in Stevens v. Commissioner, 452 F.2d 741, [746] ([9th] Cir. 1971), to the effect that as the agency charged with the administration of the Indian laws and responsible for drafting many of them, Interior's interpretation is entitled to 'great weight' and 'is not to be overturned unless clearly wrong.'" The IRS memo then proceeds at some length to construe the Stevens statement as applicable only to the facts at issue in that case. While our 1983 opinion cited the Stevens case for another proposition, it did not, in fact, cite or rely on the language quoted by IRS. That language, however, simply expresses a well-established general principle, and I find it somewhat puzzling that IRS considers it so alarming. This Department's authority to interpret federal Indian statutes and treaties derives from its paramount responsibility for Indian affairs within the federal government, just as the authority of the IRS to interpret the federal tax laws derives from its responsibility to administer those laws. Courts commonly look for guidance to federal agency interpretations of statutes within the jurisdiction of the agencies.

These last two points are minor ones, of course. My primary objections to the IRS opinion are, as discussed above, its incorrect analysis of Squire v. Capoeman and its failure to address the treaties which are at the heart of the issue under discussion.

Frank K. Richardson

U.S. Department of Justice
Office of Legal Counsel

Office of the
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Washington, D.C. 20530

DEC 12 1985

MEMORANDUM FOR DONALD PAUL HODEL
Secretary of the Interior

RE: Taxability of Indian Treaty Fishing Income

Your letter of March 22, 1985 to the Attorney General regarding the taxability, under federal law, of income earned by certain Indian tribes from the exercise of commercial fishing rights guaranteed by treaty has been submitted to the Office of Legal Counsel for review. This review, which examines the different positions of the Department of the Interior and the Internal Revenue Service (IRS) on this subject, is being undertaken pursuant to Executive Order No. 12146 (July 18, 1979) and 28 C.F.R. 0.25, which authorize the Office of Legal Counsel, on behalf of the Attorney General, to resolve legal disputes between Executive Branch agencies.

In 1983, former Solicitor Coldiron of the Department of the Interior concluded that the treaty language reserving fishing rights to Indian tribes precluded federal taxation of income derived from the exercise of those rights. 1/ The IRS does not share that view, 2/ and has attempted to collect income taxes on fishing income earned by tribal fishermen

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1/ You have provided us with a copy of a memorandum from Solicitor Coldiron to the Assistant Secretary -- Indian Affairs, dated Sept. 21, 1983, which concludes that fishermen who are members of tribes that have established treaty fishing rights are exempt from federal income tax on fishing income earned pursuant to those treaties. That conclusion was affirmed in a more recent memorandum from the Solicitor to the Secretary of the Interior, dated March 12, 1985, which you also provided to us.

2/ The Commissioner of the Internal Revenue issued technical memoranda in 1983 adopting the position that members of the affected Indian tribes are subject to the federal income tax. In a letter dated November 23, 1983, the Acting Chief Counsel of the Internal Revenue Service informed Solicitor Coldiron that the IRS saw no reason to change that position, and reviewed the legal basis for that conclusion. The IRS has maintained that position in the ongoing litigation in Tax Court (see infra).

from commercial fishing operations. A number of Indians who have received notices of deficiency from the IRS have filed petitions for redetermination in the Tax Court. 3/

As you note in your letter, the Department of Justice will need to resolve this issue in order to arrive at a uniform position of the United States, should the pending cases proceed to litigation handled by the Department. We have therefore reviewed the dispute in that context. As set forth below, we believe that the position of the IRS represents the more reasonable and sound reading of the applicable Supreme Court precedent, and therefore can be maintained in litigation handled by this Department.

I

BACKGROUND

A. Interpretation of Treaty Fishing Rights

The treaties at issue here were negotiated in the 1850's with Indian tribes living in what is now the State of Washington in order to extinguish the last group of conflicting claims to lands lying west of the Cascade Mountains and north of the Columbia River. 4/ See Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 661-62 (1979). In exchange for their interest in most of the territory, the Indians were given monetary payments and the "exclusive use" of relatively small tracts of land, as well as certain other rights, including the right to fish. Id. With immaterial variations, the treaties each provide:

> The right of taking fish at all usual and accustomed grounds and stations is

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3/ We have received copies of pleadings on summary judgment motions filed in two of those proceedings, Jefferson v. Com'r, Docket No. 836-84 (United States Tax Court); Greene v. Com'r, Docket No. 15921-84 (United States Tax Court).

4/ The Sept. 21, 1983 memorandum from Solicitor Coldiron (see n. 1) lists the following treaties as applicable here: Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132; Treaty of Point Elliott, January 22, 1855, 12 Stat. 927; Treaty of Point No Point, January 26, 1855, 12 Stat. 933; Treaty of Neah Bay, January 31, 1855, 12 Stat. 939; Treaty with the Yakimas, June 9, 1855, 12 Stat. 951; Treaty of Olympia, July 1, 1855 and January 25, 1856, 12 Stat. 971.

> secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands.

Art. III, Treaty of Olympia, 12 Stat. 972.

The scope of the fishing rights secured by these treaties, and the extent to which a state may interfere with those rights, has been considered on a number of occasions by the Supreme Court. See, e.g., United States v. Winans, 198 U.S. 371 (1905); Seufert Bros. Co. v. United States, 249 U.S. 194 (1919); Tulee v. Washington, 315 U.S. 681 (1942); Puyallup Tribe v. Department of Game (Puyallup I), 391 U.S. 392 (1968); Department of Game v. Puyallup Tribe (Puyallup II), 414 U.S. 44 (1973); Puyallup Department of Game (Puyallup III), 433 U.S. 165 (1977); Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979). The Court has recognized that the rights secured by the treaties include the right to fish for commercial, as well as subsistence, purposes, and that the fishing right was critically important to the Indians in their acceptance of the treaties. 5/ The Court has specifically rejected the argument that the treaties guarantee to the Indians only the opportunity to compete with nontreaty fishermen on an individual basis, finding instead that the treaties entitle the Indians to take a fair share of the available fish. 6/ In reaching that conclusion, the Court has found it

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5/ See Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. at 665-66 & n.7, 676 ("During the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and the Governor's promises that the treaties would protect that source of food and commerce was crucial in obtaining the Indians' assent.").

6/ See id. at 678 ("But we think greater importance should be given to the Indians' likely understanding of the other words in the treaties and especially the reference to the 'right of taking fish' -- a right that had no special meaning at common law but that must have had obvious significance to the tribes relinquishing a portion of their pre-existing rights to the United States in return for this promise. . . . In this context, it makes sense to say that a party has a right to 'take' -- rather than merely the 'opportunity' to try to catch -- some of the large quantities of fish that will almost certainly be available at a given place at a given time."); see also id. at 683; Puyallup I, 391 U.S. at 398; Puyallup III, 433 U.S. at 48-49.

significant that the Indians reserved to themselves preexisting fishing rights, rather than obtained rights from the government:

> Because the Indians had always exercised the right to meet their subsistence and commercial needs by taking fish from treaty area waters, they would be unlikely to perceive a 'reservation' of that right as merely the chance, shared with millions of other citizens, occasionally to dip their nets into the territorial waters.

Washington v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. at 678-79.

The Court has defined an "equitable measure" of the treaty right to be a division of the harvestable portion of each run that passes through a "usual and accustomed" place into "approximately equal treaty and non-treaty shares." The treaty share should be reduced, however, "if tribal needs may be satisfied by a lesser amount." *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. at 685. Drawing on cases involving Indian reserved water rights, 7/ the Court stated that:

> [T]he central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood -- that is to say, a moderate living. Accordingly, while the maximum possible allocation to the Indians is fixed at 50%, the minimum is not; the latter will, upon proper submissions to the District Court, be modified in response to changing circumstances.

Id. at 686-87.

The Court has also made clear that a state cannot interfere with the exercise of the fishing right, other than nondiscriminatory regulations reasonable and necessary for conservation of the fish. Thus, a state may not grant a

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7/ The Supreme Court has held that treaties reserving land for the use of Indians in the arid western states also reserve, by implication, rights to water sufficient to meet subsistence or other needs of the Indians reasonably within the contemplation of the parties at the time the treaties were negotiated. *See Winters* v. *United States*, 207 U.S. 564, 576 (1908); *see generally Cappaert* v. *United States*, 426 U.S. 128 (1968).

nontreaty fisherman rights to use a "fish wheel" -- a device capable of catching fish by the ton and totally destroying a run of fish, thereby effectively excluding the Indians from the right to take fish at a "usual and accustomed place." 8/ A state may not require Indians to obtain a fishing license as a prerequisite to exercise of their treaty rights, 9/ and must give Indians access across private lands, if necessary, in order to assure access to treaty fishing locations. 10/ State regulations justified on the basis of conservation must be both reasonable and necessary, and cannot discriminate against exercise by the Indians of their fishing rights. 11/

On the other hand, the Indians cannot rely on their treaty right to exclude others from access to certain fishing sites outside the reservation in order to deprive other citizens of the state of a "fair apportionment" of a particular run. 12/ In sum,

> [n]ontreaty fishermen may not rely on property law concepts, devices such as the fish wheel, license fees, or general regulations to deprive the Indians of a fair share of the relevant runs of . . . fish in the case area. Nor may treaty fishermen rely on their exclusive right of access to the reservations to destroy the rights of other 'citizens of the Territory.' Both sides have a right, secured by treaty, to take a fair share of the available fish. That, we think, is what the parties to the treaty intended when they secured to the Indians the right of taking fish in common with other citizens.

Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. at 684-85.

8/ United States v. Winans, 198 U.S. 371, 384 (1905).

9/ Seufert Bros. v. United States, 249 U.S. 194, 198 (1919).

10/ Tulee v. Washington, 315 U.S. 668, 685 (1942).

11/ Puyallup I, 391 U.S. at 398; Puyallup II, 414 U.S. at 44, 45, 48 (total ban on commercial net fishing for steelhead is not a "reasonable and necessary conservation measure").

12/ Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. at 683-84.

The analysis in these treaty fishing cases relies heavily on factual evidence about the understanding of the parties at the time the treaty was negotiated and the importance of the fishing rights to the Indians who signed the treaties. The Court, consistent with its approach in other cases involving construction of Indian treaties, gave "special meaning" to the rules that "it is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties," because of the circumstances of the negotiations:

> [This Court] has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. '[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.'

Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. at 675-76 (citation omitted).

B. Indian Tax Cases

None of the cases construing the scope of the fishing right guaranteed by treaty discuss whether the income derived from exercise of the right to take a fair share of fish at "usual and accustomed places" is exempt from federal income taxation. The Supreme Court and the lower federal courts have, however, reviewed the taxability of income earned by Indians in other contexts. The leading case involving the authority of the federal government to tax Indian income is Squire v. Capoeman, 351 U.S. 1 (1956), in which the Supreme Court considered whether capital gains from the sale of standing timber on lands allotted to noncompetent Indians 13/ pursuant to the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331 et seq., was subject to the federal income tax.

The General Allotment Act was intended to begin a new era in federal Indian policy. By treaty, most Indians had been guaranteed exclusive use of reservation land. Under the General Allotment Act, tribal lands were to be divided and allotted to individual members of the tribe. The allotments

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13/ A noncompetent Indian is one who holds allotted lands only under a trust patent, and who may not dispose of his property without the approval of the Secretary of the Interior. It does not denote mental capacity.

were to be held in trust by the United States for twenty-five years or longer, if the President deemed an extension desirable, and then to be transferred to the allottee discharged of government trusteeship. 25 U.S.C. §§ 347, 348.

The Court began its analysis in Squire with the principle, already established in prior cases, 14/ that

> Indians are citizens and . . . in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens.

351 U.S. at 5-6. The Court recognized, however, that applicable treaties or statutes could create tax exemptions, if such exemptions were "clearly expressed." Id. The Court found such an exemption in the language in section 5 of the General Allotment

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14/ In Choteau v. Burnet, 283 U.S. 691 (1931), and Superintendant of Five Civilized Tribes v. Com'r, 295 U.S. 418 (1935), the Supreme Court definitively rejected the argument that Indians are exempt from federal taxation merely because of their status, in the absence of treaty or statutory provisions to the contrary. In Choteau, the Court held taxable the petitioner's share of tribal income from oil and gas leases made by the tribe pursuant to statute, concluding that "[t]he intent to exclude [income from taxation] must be definitively expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject matter." 283 U.S. at 696 (citations omitted). In Superintendant of Five Civilized Tribes, the Court concluded that the proceeds from the investment of funds derived from a restricted allotment were subject to federal taxation. See 295 U.S. at 420-21. Both Choteau v. Burnet and Superintendant were distinguished by the Court in Squire v. Capoeman. The Court noted that Choteau concerned the question whether an Indian was exempt from tax solely because of his status, and that the facts in Choteau fit within the terms of section 6 of the General Allotment Act, which contemplates taxation of income earned by a competent Indian who has unrestricted control over lands and income thereon. Superintendant of Five Civilized Tribes was distinguished on the ground that the income involved was "reinvestment income" or "income derived from investment of surplus income on land." The Court stated that it would not be necessary to exempt such income from taxation in order to fulfill the purposes of the General Allotment Act. See 351 U.S. at 9.

Act, which provided that lands on Indian reservations allotted to individual Indians and held in trust for them by the government shall ultimately be conveyed to them in fee simple discharged of the trust and "free of all charge or incumbrance whatsoever." 25 U.S.C. § 348.

The Court recognized that this statutory provision was not "expressly couched in terms of nontaxability," and in fact was in effect prior to enactment of any federal income tax, but nonetheless concluded that the words "charge or incumbrance might well be sufficient to include taxation." 351 U.S. at 7. In reaching this conclusion, the Court relied on its earlier statements indicating that ambiguous language of treaties and statutes applicable to Indians should be interpreted favorably to the Indians:

> Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. Hence, in the words of Chief Justice Marshall, 'The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. _Worcester_ v. _The State of Georgia_, 6 Pet. 515, 582.' _Carpenter_ v. _Shaw_, 280 U.S. 363, 367.

_Id_. The Court did not find it necessary, however, to rely solely on the language of section 5. It found "additional force" in section 6 of the General Allotment Act, 25 U.S.C. § 349, which authorized the Secretary of Interior to issue a patent in fee simple to any allottee competent to manage his own affairs. That section provided that "thereafter _all restrictions as to_ sale, incumbrance, or _taxation_ of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent . . . ." (Emphasis added). The Court concluded that "[t]he literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted." _Id_. at 7-8.

The Court also found that its interpretation of the intent of section 5 was supported by several Attorney General opinions and unofficial writings "relatively contemporaneous" with the enactment of the General Allotment Act. 351 U.S. 8-9. The Court concluded the opinion with the observation that the exemption in section 5 was consistent with the overall purpose of the General Allotment Act:

> Unless the proceeds of the timber sale are preserved for respondent, he cannot go forward when declared competent with the necessary chance of economic survival in competition with others. This chance is guaranteed by the tax exemption afforded by the General Allotment Act, and the solemn undertaking in the patent.

Id. at 9.

The analysis in Squire v. Capoeman has been applied in a number of subsequent cases in the federal courts of appeals. In those cases arising under the General Allotment Act or other acts construed by the courts in pari materia with that Act, the courts have generally held that income derived directly from the ownership of restricted allotted land is exempt from federal taxation. See, e.g., United States v. Hallam, 304 F.2d 620 (10th Cir. 1962); Stevens v. Com'r, 452 F.2d 741 (9th Cir. 1971); see also Big Eagle v. United States, 300 F.2d 765 (Ct.Cl. 1962). Income that is not derived directly from the taxpayer's individual ownership of the land or that is derived from the ownership or use of unrestricted or unallotted land, however, is subject to taxation. See, e.g., Holt v. Com'r, 364 F.2d 38 (8th Cir. 1966), cert. denied, 386 U.S. 931 (1967) (income from grazing on reservation land); Fry v. Com'r, 557 F.2d 646 (9th Cir. 1977), cert. denied, 434 U.S. 1011 (1978) (income from logging operation on reservation land); United States v. Anderson, 625 F.2d 910 (9th Cir.), cert. denied, 450 U.S. 920 (1980) (income from cattle ranching on reservation land); Com'r v. Walker, 326 F.2d 261 (9th Cir. 1964) (income earned as employee of the Indian Community); Jourdain v. Com'r, 617 F.2d 507 (8th Cir.), cert. denied, 449 U.S 839 (1980) (income earned as chairman of tribal council).

These cases interpret Squire v. Capoeman to teach that a tax exemption must derive from some particular language in a treaty or statute, although that language need not specifically set out a tax exemption, and that an exemption may not be based on policy alone or on generalized references to treaties and statutes. In United States v. Anderson, the

Ninth Circuit Court of Appeals explained the Squire analysis as follows:

> The rule that ambiguous statutes and treaties are to be construed in favor of Indians applies to tax exemptions, . . . but this rule "comes into play only if such statute or treaty contains language which can reasonably be construed to confer income [tax] exemptions" . . . . 'The intent to exclude must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject matter.'

625 F.2d at 913 (citations omitted). The Court explained further that, although "policy arguments are fruitless in the absence of statutory or treaty language that arguably is an express tax exemption," policy arguments "might persuade courts to construe such arguable language, if any exists, actually to be an express tax exemption." Id. at 914 n.6.

In Karmun v. Com'r, 749 F.2d 567 (9th Cir. 1984), the Ninth Circuit applied this analysis in a case arising under the Reindeer Industry Act of 1937, 25 U.S.C. § 500. That Act authorizes the Secretary of Interior to acquire for the Alaskan natives reindeer and other property owned by nonnatives. The Secretary is authorized to distribute or hold in trust the reindeer and other property, and to organize, manage, and regulate the reindeer industry in such a manner as to establish and maintain for the Alaskan natives a self-sustaining business. See 749 F.2d at 569. The court rejected the claim made by Indians who operated herds of reindeer under that Act that their income should be exempt from federal taxation under the Squire v. Capoeman rationale. The Court noted that "[i]ncome is tax exempt under Squire only when the governing treaty or statute contains language which can reasonably be construed to confer an exemption," 749 F.2d at 570; it found "no clear expression of intent to exempt" in the Reindeer Act. In addition, the court found it significant that the purposes of the General Allotment Act and of the Reindeer Act were different:

> The purpose of the GAA was to benefit the individual allottees by preparing them to become independent citizens. Accordingly, the Squire court found that the tax exemption was crucial to fulfilling this purpose. By contrast, the purpose of the Reindeer Act is to provide a continuing food source to the Eskimos of northwestern Alaska through the establish-

> ment of a native-operated reindeer industry. That purpose is not undermined by requiring the owners and operators of reindeer herds to pay federal income taxes on their profits from the successful conduct of such operations.

749 F.2d at 570 (citations omitted).

The issue we have been asked to address -- the taxability of treaty fishing rights -- has been considered twice by the Tax Court, once before the Squire v. Capoeman decision and again in 1982. Strom v. Com'r, 6 T.C. 621 (1946), aff'd per curiam, 158 F.2d 520 (9th Cir. 1947); Earl v. Com'r, 78 T.C. 1014 (1982). In both Strom and Earl, the Tax Court concluded that income earned by the Indians from the exercise of treaty fishing rights is subject to the federal income tax. In Strom, the Tax Court rejected the argument advanced by the Indians that imposition of a tax upon income earned in carrying on a commercial fishing business is a restriction on the right to fish guaranteed by treaty:

> The Quinaielt Indians on the reservation were as free to fish in the Quinaielt River after the imposition of an income tax as they were prior to that time. The disputed income tax is not a burden upon the right to fish, but upon the income earned through the exercise of that right.

6 T.C. at 627. Noting that there was no express exemption from tax in the treaty, and that the income involved was derived "personally" by a restricted Indian (rather than in trust), the Tax Court concluded that the income was subject to the general tax provisions of the Internal Revenue Code. In Earl, the petitioner relied on Squire v. Capoeman as a basis for his claimed tax exemption, arguing that income from fishing in the usual and accustomed fishing grounds is analogous to income from the cutting of timber from allotted lands. 15/ The Tax Court rejected that analogy,

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15/ Pleadings filed by some of the Indian tribes in the pending Tax Court proceedings state that the factual premise of the holding in Earl -- that the income was earned through exercise of treaty fishing rights -- is incorrect, because the individual involved, although an Indian, was fishing as a crewmember on a vessel owned by a non-Indian, and merely shared in proceeds of fishing attributable to non-Indian treaty shares.

finding rather that the treaty language guaranteeing the right to fish "contains nothing dealing with the taxation of income derived from such fishing." 78 T.C. at 1017. Moreover, it found that the right of an Indian to share in treaty fishing rights is more comparable to his rights as a member of the tribe in unallotted land on the reservation (income from which would not be exempt under Squire v. Capoeman) than to individual rights in allotted land (income from which would fall within the "free from charge or incumbrance" language analyzed in Squire v. Capoeman). Id.

In contrast to its treatment of cases involving federal taxation, the Supreme Court has repeatedly held that Indians and their property are exempt from state taxation within their reservations, unless Congress clearly manifests its consent to such taxation. See Montana v. Blackfeet Tribe of Indians, 470 U.S. ___, 53 U.S.L.W. 4625, 4627 (1985); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71 (1973). Those decisions rest on a preemption rationale, as explained by the Court in Bryan v. Itasca County, 426 U.S. 373 (1976):

> The McClanahan principle derives from a general pre-emption analysis that gives effect to the plenary and exclusive power of the Federal Government to deal with Indian tribes, and "to regulate and protect the Indians and their property against interference even by a state." This pre-emption analysis draws support from "the 'backdrop' of the Indian sovereignty doctrine," "'[t]he policy of leaving Indians free from state jurisdiction and control [which] is deeply rooted in the Nation's history,'" and the extensive federal legislative and administrative regulation of Indian tribes and reservations. "Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation," and therefore "'State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.'"

426 U.S. at 376 n.2 (citations omitted). Property and income earned outside the reservation, however, have generally been held to be subject to nondiscriminatory state taxation, unless federal law otherwise provides for an exemption. See Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49, 155-56 (1973) (state may impose gross receipts tax on ski resort operated by Indian Tribe on off-reservation land).

C. Positions of the Department of the Interior and the IRS

The Department of the Interior and the IRS both recognize that the relevant analysis here is that used by the Court in Squire v. Capoeman. The disagreement centers on whether the treaty language is sufficiently specific to meet the threshold requirements of Squire, and what role policy considerations play in interpreting that language.

1. Department of the Interior position

The Department of the Interior maintains that the treaty language expressly securing to the Indians the right of "taking fish at usual and accustomed grounds and stations" is language that meets the threshold requirement of Squire v. Capoeman that a tax exemption be based on specific language. It is language that is "directly applicable" to the fishing activity, and does not state any limitation on the right other than that the right is to be exercised in common with other citizens. Interior therefore argues that the language, on its face, "might well be read to prohibit any limitation on diminishment of the fishing right other than the one specified." Interior Memorandum (Sept. 21, 1983) at 9.

Interior acknowledges that the language "might also be read otherwise," but argues that, at a minimum, an ambiguity exists and, accordingly, that the treaty must be construed in the light most favorable to the Indians. See generally Squire v. Capoeman, 351 U.S. at 7. Interior notes that at the time of negotiation of the treaty the reference to the right of "taking fish at usual and accustomed grounds and stations" was clearly intended to include commercial fishing activities, see Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. at 665-66 & n.7, 676, and that the Indians were assured that they would be able to fish and trade as they had prior to the treaties -- that is, without taxation and with no obligation to turn over a portion of their fishing catch or proceeds to the federal government. Thus, Interior reasons that "it is no more likely that the Indians understood that the federal government would tax their fishing right than that they understood that future states would be able to impose a charge upon it." Interior Memorandum (Sept. 21, 1983) at 10. 16/

2. IRS Position

IRS contends that the interpretation advanced by the Department of the Interior would be "an unwarranted expansion of the principles announced in Squire v. Capoeman." IRS Memorandum at 11-12. IRS believes that the treaty language granting the fishing rights cannot reasonably be construed to create a tax exemption. IRS views Interior's position as a policy argument of the type the courts have rejected as a sole basis for a tax exemption, and views the "non-tax cases" cited by Interior (i.e., those cases construing the treaty fishing rights) as inapposite, because they merely "clarify the rights which the treaties guarantee -- rights which we are disputing only to the extent that Interior is reading them to convey a specific tax exemption." IRS Memorandum at 10. Accordingly, IRS maintains that the reasoning of the Tax Court in Strom and Earl is persuasive, and should be followed by the IRS in its enforcement efforts.

16/ This argument is considerably expanded in the pleadings filed by Indian tribes in the Tax Court proceedings. Those tribes have opposed motions for summary judgment filed by the IRS on the ground, inter alia, that "a decision cannot be made without a thorough understanding of the historical and anthropological data surrounding the negotiation of the Treaty," which can be presented only at trial. See, e.g., Brief for Petitioner, Jefferson v. Com'r, Docket No. 836-84 (Tax Court, Apr. 18, 1985) at 2. A number of affidavits have been offered with those pleadings to provide a foundation for petitioners' claims that at trial they will demonstrate that the Indians negotiating the treaties did not contemplate that the United States would be allowed to tax or otherwise to take a share of the fishery which the Indians reserved for themselves. The tribes also argue that there is no evidence that the United States attempted to negotiate for the right to tax treaty fishing income in the treaty negotiations or understood that the treaty gave it that right, and that there is no suggestion in the numerous Supreme Court and lower federal court decisions construing treaty fishing rights that "one of the federal purposes in negotiating these agreements was to enable [the government] to raise revenue from the Indians' commerce." Id. at 6.

II

ANALYSIS

The dispute between the Department of the Interior and the IRS arises out of an inherent tension between two applicable, long-standing canons of construction: first, that, regardless of the circumstances, exemptions from federal income taxation be "definitely expressed"; 17/ and second, that treaties and statutes affecting Indians are to be interpreted liberally, in light of the trust responsibility of the United States and bearing in mind the Indians' historically inferior bargaining position, which characterized the negotiation of the treaties. 18/ Unfortunately, the courts have not been wholly consistent in describing how the balance between the competing canons should be struck. In Squire, the Court noted that the "free from charge or incumbrance" language of section 5 was not "expressly couched in terms of nontaxability," but found that the words used were "susceptible of a more extended meaning than their plain import, as connected with the tenor of their treaty." 351 U.S. at 7. In Choteau v. Burnet, the Court stated that the intent to exclude must be "definitively expressed." 283 U.S. at 696. The language used in United States v. Anderson referred both to the need for "express exempting language in a statute or treaty," 625 F.2d at 917, and to statutory or treaty language "that arguably is a tax exemption," id. at 914 n.6. In Holt v. Com'r, the Court referred to language that "can reasonably be construed to confer income tax exemptions." 364 F.2d at 40.

Nor have the courts articulated precisely what types of underlying considerations would be persuasive in construing specific language as a tax exemption. While the courts have generally rejected arguments that the general goal of increased economic opportunities for Indians justifies an exemption from federal income taxes, they have nevertheless recognized that the federal government's responsibility to the Indians must color interpretation of treaty rights and obligations. Moreover, there are few concrete examples to guide our analysis,

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17/ See supra at 7-8 & n.14.

18/ See supra at 6.

because as far as we are aware, the only specific language that has been analyzed by the courts for the purpose of determining whether a federal tax exemption exists is the language in sections 5 and 6 of the General Allotment Act.

Although in the absence of direct guidance from the courts it is difficult to determine definitively whether the treaty language falls within the *Squire* rationale, we believe that the position taken by the IRS represents the sounder view of the law. For this reason, as we discuss below, we believe that if the pending cases proceed to the federal courts, the Department of Justice could argue the position set out by the IRS.

The Department of the Interior has argued that because the treaty contains *some* language dealing with fishing rights the threshold *Squire* v. *Capoeman* test has been met. We believe that is an overly broad reading of *Squire* v. *Capoeman*. There is a significant difference between the specific language relied upon by the Court in *Squire* v. *Capoeman* and the language relied upon by the Department of the Interior to support a tax exemption. In *Squire*, and in its preceding decisions in *Choteau* and *Superintendant of Five Civilized Tribes*, the Court emphasized that the language creating a tax exemption must be specific and clear, because the language of the Internal Revenue Code otherwise plainly encompasses income earned by Indians from any source. *See supra* at 7-8 & n.14. In *Choteau* and *Superintendant of Five Civilized Tribes* the Court did not find such language, even in the face of express treaty guarantees of exclusive use of reservation land (language that the Court did not address). The difference in *Squire* was the presence of specific statutory language that, although not expressly mentioning taxation, expressly dealt with "charges" and "incumbrances" that might be levied on the allotted land. In addition, the Court had the benefit of other literal language in the statute dealing with the grant of the land in fee simple to the Indians, which expressly included taxation as a restriction that otherwise might be applicable to the land. Thus, it was not difficult for the Court to conclude that Congress intended to include taxation (including taxation of income derived directly from the land) as a "charge or incumbrance" within the meaning of section 5 of the General Allotment Act.

Here the treaty language granting Indians the "right of taking fish" does not contain any comparable specific language dealing with "charges," "incumbrances," "restrictions," or other type of limitations. Rather, that language merely grants a particular right. It is more analogous to broad treaty language granting the Indians exclusive use of reservation land, 19/ or language in the General Allotment Act granting Indians rights to allotted lands 20/ -- neither of which was even considered by the Court in Squire or subsequent cases. On its face, then, we believe the treaty language lacks the specificity and focus of the language at issue in Squire.

To be sure, the Supreme Court in considering the scope of the "right of taking fish" suggested that the only permissible limitations on that right are reasonable, nondiscriminatory regulations designed to conserve the fish (and thereby preserve the fishing right). See, e.g., Puyallup I, 391 U.S. at 398; Puyallup II, 414 U.S. at 44, 45, 48. As noted above, however, the Court has not considered the question whether taxation of the income earned from the exercise of the fishing right is or is not contemplated by the treaty language. We believe that taxation of the income earned from the exercise of the treaty fishing right would have a qualitatively different effect on those rights than did the restrictions struck down by the Court in the treaty cases. The latter restrictions involved an actual limitation on the ability or opportunity of the Indians to take fish at the treaty locations -- such as prohibitions on access, the use of physical devices that diminish or destroy the runs of fish available to the Indians, or license fees required as a prerequisite for exercise of

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19/ See, e.g., Treaty of Olympia, July 1, 1855 and January 25, 1865, 12 Stat. 971 ("There shall . . . be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendant of Indian affairs or Indian agent.")

20/ See, e.g., 25 U.S.C. § 331 ("[T]he President shall be authorized . . . to cause allotment to each Indian"); id. § 334 (allotments to Indians not residing on reservations); Id. § 336 (allotments to Indians making settlement on unappropriated lands).

fishing rights. *See* discussion *supra*. An income tax on the profits received from exercise of those fishing rights, while it may diminish the economic value of the right, does not interfere with the scope of the right itself -- that is, to take a reasonable share of the available fish.

The taxation of profits earned from the exercise of treaty fishing rights will, of course, have an economic impact on Indians who earn that income. But the reduction of the economic value of a right guaranteed to the Indians has generally not been considered to be sufficient reason, standing alone, to create a tax exemption. *See*, *e.g*, *United States* v. *Anderson*, 625 F.2d at 914 n.6 ("*Capoeman* and every other Supreme Court and Ninth Circuit case have held that such policy arguments are fruitless in the absence of statutory or treaty language that arguably is an express tax exemption."); *Fry* v. *United States*, 557 F.2d at 649 ("[I]t is one thing to say that courts should construe treaties and statutes dealing with Indians liberally, and quite another to say that, based on those same policy considerations which prompted the canon of liberal construction, courts themselves are free to create favorable rules."). The fact that the right was created by language in a treaty does not provide an exception to the general rule favoring taxation, when that language merely establishes the existence of a the right in broad terms. Otherwise, *Squire* v. *Capoeman* would be reduced to quite mechanical operation: *i.e.*, if a right is granted to Indians by express language in a statute or treaty that benefits the Indians economically, income earned from exercise of that right is exempt from federal income taxation. We believe that conclusion is inconsistent with *Squire* v. *Capoeman*, as well as the conclusions in *Choteau* v. *Burnet* and *Superintendant of Five Civilized Tribes*. 21/

21/ If *Squire* v. *Capoeman* were to be read that broadly, we would have difficulty developing a principled distinction between cases in which a right is granted by express language and cases in which a right is implied. For example, the statute at issue in *Karmun* v. *Com'r*, the Reindeer Industry Act, arguably gave Indians an implied right to operate herds of reindeer for profit, subject to the supervision of the Secretary of Interior. Similarly, treaties between the United States and Indians in the western states have generally been interpreted to grant implied rights to use water that is minimally necessary to carry out the needs of the tribe, even if no water is expressly guaranteed by the

(Continued)

Additionally, in Squire the Court was able to point to a direct link between the tax exemption and the purpose of the statute, which was to grant individual Indians an unencumbered right to their allotted land, when they were judged ready to assume full responsibility for that land and the obligations flowing from ownership. During the period of trusteeship, that purpose could be thwarted by taxation of income received directly from use of the land, because a failure to pay that tax could result in a tax lien on the property. See Squire v. Capoeman, 351 U.S. at 10. Here, however, the link is much more tenuous, for it is difficult to argue that taxation of the net income derived from exercise of the fishing right would threaten the continued availability of that right. Accordingly, this situation is analogous to that described by the Court in Karmun v. Com'r:

> Moreover, as the Tax Court observed, the purpose of the legislation involved here [the Reindeer Industry Act] is entirely different from that in Squire. The purpose of the GAA was to benefit the individual allottees by preparing them to become independent citizens. Accordingly, the Squire court found that the tax exemption was crucial to fulfilling this purpose. Squire, 351 U.S. at 9. By contrast, the purpose of the Reindeer Act is to provide a continuing food source to the Eskimos of northwestern Alaska through the establishment of a native-operated reindeer industry. 25 U.S.C. § 500 (1982). That purpose is not undermined by requiring the owners and operators of the reindeer herds to pay federal income taxes on their profits from the successful conduct of such operations.

749 F.2d at 570.

21/ (Continued)

treaties. It seems to us that, to the extent it is argued that the express grant of a right to Indians that has economic benefit carries with it a tax exemption, the argument should also apply to implied treaty rights. Clearly, however, that argument is inconsistent with the Court's analysis in Squire v. Capoeman and its repeated assertions that exemptions from taxation must be clearly and definitively expressed.

Nor do we find persuasive the further argument that because neither the Indians nor the United States contemplated, at the time the treaties were negotiated, that income derived from commercial fishing would be taxable, the rights reserved by the Indians include the right to be free from taxation. The argument, if taken to its logical extreme, would require that all income earned by Indians deriving from the exercise of a treaty or statutory right that predates the federal income tax be exempt from that tax. In Choteau, Superintendant of Five Civilized Tribes, and Squire, the Supreme Court implicitly rejected that argument, holding that Indians are not exempt from federal income taxation merely because of their status as Indians (i.e. as formerly sovereign people who had not been subject to the tax), but rather could claim an exemption only on the basis of specific treaty or statutory language indicating an intent to exempt. Finally, the argument, again if taken to its logical extreme, would mean that the courts could never take account of changes in conditions, laws, or regulations that postdate negotiation of the treaties -- a view that would, we believe, stretch the canon of construction favoring interpretation of treaties as the Indians understood them beyond the scope intended by the Supreme Court. As the Court stated in Kennedy v. Becker, 241 U.S. 556, 563 (1916), "[i]t has frequently been said that treaties with the Indians should be construed in the sense which the Indians understood them. But it is idle to suppose that there was any anticipation at the time the treaty was made of the conditions now existing to which the legislation in question was addressed."

Finally, we do not believe the cases dealing with state taxation of Indians are relevant to the question of federal taxation. As discussed above, supra at 12, those cases rest on a preemption rationale that is not pertinent to interpretation of federal laws. See Choteau v. Burnet, 283 U.S. at 696 ("Royalties received by the government from mineral lease of Indian lands have been held beyond a State's taxing power on the ground that, while in the possession of the United States, they are a federal instrumentality, to be used to carry out a governmental purpose. It does not follow, however, that they cannot be subjected to a federal tax.").

III

CONCLUSION

For these reasons, we conclude that the position maintained by the IRS that income earned from exercise of treaty fishing rights is subject to the federal income tax is the sounder view of the law. We believe that position is fully consistent with the applicable Supreme Court precedents and is consonant with the trust relationship held by the United States with respect to Indian tribes.

Allan Gerson

Allan Gerson
Deputy Assistant Attorney General
Office of Legal Counsel

cc: Honorable James A. Baker III
Secretary of the Treasury

THE SECRETARY OF THE INTERIOR
WASHINGTON

February 22, 1985

Honorable James A. Baker III
Secretary of Treasury
Washington, D.C. 20220

Dear Secretary Baker:

Since 1982, the Internal Revenue Service (IRS) has been engaged in efforts to collect income taxes from certain Indian fishermen on income derived from treaty fishing activities. The two immediately affected tribes have asserted that treaty fishing income is not subject to Federal income tax. Their concerns are practical as well as legal since taxation of treaty fishing earnings would substantially diminish the economic value of the treaty rights.

We share these concerns and are apprehensive regarding the effect of the IRS position on members of the other 22 treaty fishing tribes in the Northwest. Moreover, Indian treaty fishing activities elsewhere in the United States would appear to be adversely affected if subjected to income taxation. Consequently, the Department has seriously examined this matter and concluded that Indian income from commercial fishing under the treaties with the Northwest tribes should not be subject to Federal income tax. This issue has been examined and a conclusion reached that as a matter of law treaty fishing was tax exempt.

Representatives from the Department of the Interior will be meeting next week with officials of your Department to discuss this matter. I wanted you to know of my personal interest in this issue and express my hope that it can be resolved in a fashion that recognizes the special obligations of the United States to the Indian tribes.

Sincerely,

Donald Paul Hodel

DONALD PAUL HODEL

THE SECRETARY OF THE INTERIOR
WASHINGTON

March 22, 1985

Honorable Edwin Meese
Attorney General of the United States
U.S. Department of Justice
Washington, D. C. 20530

Dear Mr. Attorney General:

We are writing to advise you of the Department's concern about the Federal income tax status of treaty fishing income earned by members of tribes whose right to fish commercially is guaranteed by treaties negotiated with the United States during the 1850's, and about a conflict in the positions of this Department and the Department of Treasury on this matter. In 1983, former Solicitor Coldiron of this Department concluded that the commitments made to the tribes in those treaties precluded Federal taxation of income derived from the exercise of the treaty fishing rights. That opinion has since been reconfirmed. The Department of the Treasury does not share our view, and the IRS, which began enforcement efforts against certain tribal fishermen in early 1982, continues to press these efforts. We remain in contact with the Department of the Treasury on this matter, but it is not clear that our two Departments will be able to resolve the issue. It is conceivable, therefore, that the Department of Justice will eventually be required to resolve it in order to arrive at the proper position for the United States to take as litigation progresses in U.S. District Court.

The Stevens treaties have been interpreted by the Supreme Court to reserve to the Indians the right to fish commercially, limited only to the extent that non-Indians must also be afforded the opportunity to fish and that Indian treaty fishing may be regulated by the states (or Federal Government) for resource conservation purposes. Indians who were parties to the Stevens treaties understood that they would be able to continue fishing and trading fish without, in any way, having to turn over to the Federal Government a portion of their catch. Diminution of the treaty fishing rights through the imposition of a tax not only represents an attack on the unique relationship existing between the United States and Stevens Treaty Tribes, but marks an abrupt departure from President Reagan's January 24, 1983, Indian Policy Statement which reaffirms the Federal Government's commitment to that relationship and to the trust responsibility involving Indian natural resources, and, which further, encourages the development of strong reservation economies.

It is evident that a decision to honor the commitments made by the United States in the Stevens treaties would not result in a significant loss of tax revenue to the United States. Data generated by the Lummi Tribe in a 1981 commercial fishing loan study reveals that, based on generous estimates, the potential tax revenue which could be derived from all Lummi tribal fishers, in an above average fishing year, would approximate $70,000. Potential revenue which would be derived from taxing all treaty fishing income for all tribes would probably not exceed $120,000 annually.

In 1981 approximately 1,000 Lummi tribal members received licenses to fish, 583 members sold fish, and 232 members (nine percent of tribal enrollment) were considered as full-time fishers. Total fishing fleet size involved 379 vessels, including 216 skiffs and 22 purse seine vessels. Only 125 skiff owners, 85 gillnetters and 19 purse seine vessel owners made more than 20 sales. The skiff fleet's gross income in 1981 averaged $6,000/vessel, and ranged from $600 to $25,000 per vessel. The average gill net fisher operated at a net loss in 1981. The purse seiner fleet's gross income in 1981 averaged $172,000/vessel, and ranged from $62,000 to $347,000 per vessel. Tribal fisher operators who fished, but did not own boats, in 1981, averaged $5,600 in gross income. The 1981 study classified approximately ninety percent of the Lummi fleet as impoverished, yet the Lummi Tribe is the most efficient treaty fishing tribe in the State of Washington.

At our request, the Solicitor has reviewed the IRS legal opinion of November 23, 1983, issued in response to Solicitor Coldiron's opinion. For your information, we are enclosing Solicitor Coldiron's opinion, the IRS response, and Solicitor Richardson's review of the IRS opinion.

Sincerely,

Donald Paul Hodel

DONALD PAUL HODEL

Enclosures

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

March 22, 1985

Honorable Ronald A. Pearlman
Assistant Secretary for Tax Policy
Department of the Treasury
Washington, D. C. 20220

Dear Mr. Pearlman:

On February 19, 1985 we wrote to you expressing our continuing concern about the Federal income tax status of treaty fishing income earned by members of tribes whose right to fish commercially is guaranteed by treaties negotiated with the United States during the 1850's. Following more recent conversations with officials and staff of your Department, we remain convinced that Solicitor Coldiron's opinion of September 21, 1983, is correct, and we urge you to reconsider your position on the matter.

The Stevens treaties have been interpreted by the Supreme Court to reserve to the Indians the right to fish commercially, limited only to the extent that non-Indians must also be afforded the opportunity to fish and that Indian treaty fishing may be regulated by the states (or Federal Government) for resource conservation purposes. Indians who were parties to the Stevens treaties understood that they would be able to continue fishing and trading fish without, in any way, having to turn over to the Federal Government a portion of their catch. Diminution of the treaty fishing rights through the imposition of a tax not only represents an attack on the unique relationship existing between the United States and Stevens Treaty Tribes, but marks an abrupt departure from President Reagan's January 24, 1983, Indian Policy Statement, which reaffirms the Federal Government's commitment to that relationship and to the trust responsibility involving Indian natural resources, and, which further, encourages the development of strong reservation economies.

It is evident that a decision by your Department to honor the commitments made by the United States in the Stevens treaties would not result in a significant loss of tax revenue to the United States. Data generated by the Lummi Tribe in a 1981 commercial fishing loan study reveals that, based on generous estimates, the potential tax revenue which could be derived from Lummi tribal fishers, in an above average fishing year, would approximate $70,000. Potential revenue which would be derived from taxing treaty fishing income for all tribes would probably not exceed $120,000 annually.

In 1981, approximately 1,000 Lummi tribal members received licenses to fish, 583 members sold fish, and 232 members (nine percent of tribal enrollment) were considered as full-time fishers. Total fishing fleet size involved 379 vessels, including 216 skiffs and 22 purse seine vessels. Only 125 skiff owners, 85 gillnetters and 19 purse seine vessel owners made more than 20 sales. The skiff fleet's gross income in 1981 averaged $6,000/vessel, and ranged from $600 to $25,000 per vessel. The average gill net fisher operated at net loss in 1981. The purse seiner fleet's gross income in 1981 averaged $172,000 vessel, and ranged from $62,000 to $347,000 per vessel. Tribal fisher operators who fished, but did not own boats, in 1981, averaged $5,600 in gross income. The 1981 study classified approximately ninety percent of the Lummi fleet as impoverished, yet the Lummi Tribe is the most efficient treaty fishing tribe in the State of Washington.

At the Secretary's request, the Solicitor has examined the November 23, 1983, IRS legal opinion on this matter. His analysis is enclosed. The Secretary has also written the Attorney General of the United States, advising him of this matter and conveying our concerns as they relate to your position. I would like to meet with you as soon as you have had time to consider our position as stated herein, and will be contacting you shortly to arrange for a meeting.

Sincerely,

William P Horn

Deputy Under Secretary

Enclosure

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

MAR 2 2 1985

Mr. Larry G. Kinley
Chairman, Lummi Indian Business Council
2616 Kwina Road
Bellingham, Washington 98226-9298

Dear Mr. Kinley:

Thank you for your letter of February 22 to Secretary Hodel expressing your continuing concern about the Federal income tax status of treaty fishing income earned by members of the Lummi Tribe. We very much appreciate your willingness to address the U.S. - Canada Treaty and Indian treaty income tax issues as separate matters.

We are very much aware of the inconsistency between the asserted goal of the United States in the Treaty negotiations with respect to the Lummi Tribe's Stevens treaty rights, and the efforts of the United States, through the Internal Revenue Service, to tax treaty fishing income, efforts which, if successful, will diminish the value of the treaty rights. Our position fully supports the view of the Lummi Tribe that the solemn commitments made by the United States in the Stevens treaties have not been modified to justify Federal taxation of treaty fishing income.

In recent correspondence to Mr. James G. Watt, who had written us on your behalf, we assured him that we are pursuing all means for resolving this issue in a just manner. To that end, we have written to the Assistant Secretary for Tax Policy, Department of the Treasury, restating this Department's position on this matter in most emphatic terms, and responding to IRS criticisms of that position. We have also written the Attorney General of the United States, advising him of this matter, and conveying our concerns. Copies of these letters are enclosed.

We, of course, will keep you apprised of developments as they occur.

Sincerely,

Bill Horn

Deputy Under Secretary

Enclosures

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

March 22, 1985

Mr. James G. Watt
1575 Eye Street, N.W.
Suite 575
Washington, D. C. 20005

Dear Mr. ~~Watt~~: Jim

Thank you for your letter of February 13 to Secretary Hodel expressing your continuing concern about the Federal income tax status of treaty fishing income earned by members of the Lummi Tribe. As you pointed out, former Solicitor William H. Coldiron, in September 1983, issued an opinion concluding that income earned by treaty fishermen in the exercise of their treaty fishing right was exempt from Federal income taxation because such taxation was precluded by the guarantees made to the Indians in the Stevens treaties. That opinion has been reconfirmed by our present Solicitor, Frank K. Richardson.

Given the significant policy considerations involved, the relatively small amount of additional tax revenue derived, and the economic impact of such taxes on the individual tribal fisherman, we are pursuing all means for resolving this issue in a just manner. To that end, we have written to the Assistant Secretary for Tax Policy, Department of the Treasury, restating this Department's position on this matter in most emphatic terms, and responding to IRS criticisms of that position. We have also written the Attorney General of the United States, advising him of this matter, and conveying our concerns. Copies of these letters are enclosed.

We, of course, will keep you apprised of developments as they occur.

Sincerely,

Bill

Deputy Under Secretary

Enclosures

PREPARED

STATEMENT OF HARRIS ATKINSON

MAYOR, METLAKATLA INDIAN COMMUNITY

OF THE

ANNETTE ISLAND RESERVE, ALASKA

BEFORE
THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

March 27, 1987

TAXATION OF INDIAN FISHING RIGHTS - S. 727

Mr. Chairman, my name is Harris Atkinson. I am the Mayor of the Metlakatla Indian Community of the Annette Islands Reserve located in southeastern Alaska. The Annette Islands Reserve was set apart for the exclusive use of our people by statute enacted by the United States Congress on March 3, 1891 (25 U.S.C. § 495) and includes the waters adjacent to the Annette Islands. Our fishing rights, both subsistence and commercial, are vital to the economic and social welfare of the Metlakatla people. Fishing activities in our Reserve are regulated by the U.S. Department of the Interior for purposes of conservation. In addition, these regulations further the federal purpose of establishing and maintaining the Reserve in order to provide for the economic support and advancement of our people. *See* 25 C.F.R. § 241.3 and *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918).

The Metlakatla Indian Community is pleased that this Committee is concerned with protecting the economic integrity of Indian rights to fish pursuant to treaty and Executive order. Far too often the responsibilities to Native Americans pursuant to the federal trust relationship have been undercut by federal agencies which do not understand, or refuse to acknowledge, the legal basis for this trust relationship. The Metlakatla Indian Community supports the objective of S. 727: to protect Indian rights under treaty and Executive order from being diminished in value by the Internal Revenue Service, as well as other federal agencies.

While the Metlakatla Indian Community supports S. 727, we are concerned that the bill as drafted may fail to adequately protect our unique fishing rights. The bill's language addresses "rights to fish secured by such treaty or executive order ... ." The Metlakatla Indian Community, however, is the beneficial owner of our Reserve, including the adjacent waters, pursuant to a federal statute, 25 U.S.C. § 495. Therefore, on behalf of ourselves and all other Native American tribes whose rights are guaranteed by federal law other than treaty or Executive order, we respectfully request that this Committee amend the language in Section 1(a), page 1 at line 6 of the bill to read, "such treaties, executive orders, or other provisions of federal law" and also to amend page 2, line 2 to read "rights to fish secured by such treaty, executive order, or other provision of federal law ... ."

This proposed amendment is consistent with the language of the original legislation introduced as an amendment to the debt ceiling bill in the 99th Congress. Our amendment will clarify that Indian fishing rights guaranteed by federal law, including rights not derived from treaties or executive orders, will be protected from taxation. This suggested amendment is attached to this statement. We respectfully request that S.727, as amended, be enacted.

On behalf of the Metlakatla Indian Community, I thank you for your assistance.

AMENDMENT TO S. 727 PROPOSED BY METLAKATLA INDIAN COMMUNITY

Section 1(a). Indian Fishing Rights

Page 1

- lines six and seven, delete "and any"
- line seven, insert the following after "executive orders":

"or other provisions of Federal law"

Page 2

- line one, delete "or."
- line two, insert the following after "executive order":

"or other provision of federal law"

PREPARED STATEMENT OF ROSS O. SWIMMER

Good morning, Mr. Chariman and Members of the Committee. I am pleased to be here to present the views of the Department of the Interior on S. 727, a bill "To clarify Indian treaties and executive orders with respect to fishing rights."

We support enactment of S. 727 which would resolve an issue of great concern to Indian fishing tribes throughout the country, and which is an immediate concern ot the Lummi Tribe and other Pacific Northwest fishing tribes: The taxation of income earned by tribal members exercising tneir fishing rights.

S. 727 would amend tne provision codified in 25 U.S C. 71 to provide that any treaies and executive orders under which any Indian tribe is recognized, shall be construed to prohibit the imposition under Federal or State law, of any tax on income derived by an Indian from the exercise of rights to fish secured by treaty or executive order, regardless of whether such rights are limited to subsistence or commercial fishing.

Recent opinions of the Solicitor, Department of the Interior, asserted that commitments made to Indian tribes preclude Federal taxation of income derived from the exercise of fishing rights. Last year, Secretary Hodel wrote to the Attorney General expressing the Department's concerns about such taxation, stating that the imposition of such a tax would represent an attack on the unique relationship existing between the United States and the tribes, and mark an abrupt departure from President Reagan's Indian Policy Statement of January 24, 1983. Correspondence to the Department of the Treasury also made clear the Interior Department's position on this issue.

As you know, the Internal Revenue Service is charged by the Congress with the responsibility of interpreting and applying the tax laws set forth in the Internal Revenue Code. It determined that income derived personally by a restricted Indian in the exercise of fishing rights is taxable unless the applicable treaty contains language conferring an income tax exemption. The review of the positions of the Department of the Interior and Internal Revenue Service undertaken by the Department of Justice pursuant to Executive Order No. 12146 and 28 CFR 0.25, concluded that the Internal Revenue Service position is the sounder view of the law. The Department of Justice ruling maintains the IRS position that income earned from the exercise of Indian fishing rights is subject to Federal taxation. S. 727 would change applicable law to provide that the income derived from such Indian fishing would no longer be subject to Federal taxation.

Generations of American Indians have developed lifestyles, cultures, religious beliefs and customs around their relationships with fisheries resources. Historically, these resources provided food and tools, and were traded for a variety of goods. They continue to provide a base of sustenance, cultural enrichment and economic support for many tribes,and help maintain tribal social structure and stability by permitting gainful employment in traditional desirable occupations.

At the time Indian treaties were signed, many tribes reserved to themselves the right to fish in perpetuity. Additionally, and as partial compensation for the land ceded by the tribes, the federal Governement has assumed a trust responsibility that guarantees federal protection of Indian fishing rights. By the terms of their treaties the tribes shared a resource that they alone had previously used. It seems unfair to us to require them now to share, through the imposition of Federal taxes, the proceeds from the part of the fishery that it was agreed they would retain for themselves.

The Indians who were parties to the treaties thought they would be able to continue to fish and trade fish as they had in the past, when they did not pay taxes, and were not required in any way to turn over a portion of their catch to the Government. Some courts have precluded states from taxing Indian fishing activities. I believe that the Congress should apply the same rule to the Federal Government.

It is the Department of the Interior's understanding that enactment of S. 727 would not result in as significant loss of Federal tax revenue. Data generated by the Lummi Tribe in a 1981 commercial fishing loan study reveals that, based on generous estimates, the potential tax revenue which could be derived from all Lummi tribal fishers, in an above average fishing year, would approximate $70,000. Since the Lummi Tribe harvests approximately one-half of the total Stevens Treaty tribal catch each year, the potential revenue which would be derived from taxing all income associated with the exercise of federally secured Indian fishing rights for all tribes would probably not exceed $120,000 annually. Additionally, small amounts of revenue would be derived from taxing the fishing related income of other tribes.

Lifting this tax burden will, at minimal cost to the Federal Government, contribute to the implementation of the President's policy in support of the development of Indian reservation economies. The president noted in his policy statement, which was announced on January 24, 1983, that tribal fishing resources provide an avenue of development for many tribes. He initiated an effort to identify and remove Federal barriers to the development of tribal resources and to create a positive environment for the development and growth of reservation economies.

This concludes my prepared statement. I will be happy to answer any questions the Committee may have.

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

APR 9 1987

Honorable Daniel K. Inouye
Chairman, Select Committee
on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This provides additional information requested at the March 27 hearing on S. 727, a bill "To Clarify Indian Treaties and executive orders with respect to fishing rights." We were requested to provide the Committee with information regarding money spent by the Department of the Interior to defend members of Indian tribes in cases where the Internal Revenue Service has attempted to tax income earned by members of Indian Tribes exercising their treaty fishing rights. This also provides the information requested by Joe Mentor of your staff on April 2. The questions and answers are listed below.

1. "How much has the Department of the Interior spent in providing assistance to tribes?"

   The Department of the Interior has provided the Lummi Tribe of Washington with $41,000 for attorney fees. Within the time available we have not developed estimates of the cost of staff time and related expenses that have been spent on this subject.

2. "Give an estimate of the actual cost in defending the Indian tribes."

   Except as indicated in the answer to question 4. below, we do not have information on the costs in addition to those provided by us. However, the cost of defending tribes and tribal members exercising tribal rights in current and subsequent litigation depends upon a number of variables including the total number of tribes which would engage in litigation, the extent to which these tribes would work together and share information, and the extent to which the Departments of Interior, Justice and Treasury would be involved. At a minimum, it is anticipated that the treaty fishing tribes of Western Washington, the Columbia River, and the Great Lakes would initiate litigation, joined perhaps, by the Hoopa Valley Tribe, and by other tribes engaged in commercial fishing enterprises (e.g., the Red Lake and Leech Lake tribes of Minnesota). Many other tribes throughout the country may join in if they perceive the outcome of this litigation as possibly affecting income derived from other trust resources. Total costs for litigation support and attorney fees could run into the millions.

3. "Provide an estimate of how much of the cost will actually be collected."

   The potential revenue which would be derived from taxing all treaty fishing income would probably not exceed $300,000 annually.

4. "How much money will the tribes have to spend?"

   See response to Question 2. The tribes would have to pick up those litigation support and attorney fees costs not funded by the Federal Government.

   It is our understanding that, to date, other Puget Sound tribes have spent $25,000 in attorney fees and that in two cases involving Michigan tribes, the Native American Rights Fund (NARF) has provided $13,110 in attorney fees.

5. "How much are the Departments of Justice and the Treasury spending in prosecuting these cases?"

   The Department of Justice has advised us that it has been involved in only one such case, involving what they describe as negligible costs and attorney fees.

   We have been advised by the Seattle District Office of the Internal Revenue Service that it has spent on the Lummi cases alone, about $20,000 in staff time. This does not include related expenses.

We hope this information is helpful. If we can be of further assistance to you in this matter, please advise.

Sincerely,

/S/ Ross O. Swimmer

Assistant Secretary - Indian Affairs

PREPARED STATEMENT OF HARRY R. SACHSE

I am Harry R. Sachse, a member of the firm of Sonosky, Chambers and Sachse in Washington, D.C. I served for six years as an assistant to the Solicitor General of the United States under Solicitors General Griswold and Bork where I argued some eight Indian cases in the Supreme Court. I have taught Indian law at Harvard and the University of Virginia.

I was asked by the Committee staff to comment on S.727 and the taxation of Indian fishing. I strongly support the bill.

Indian treaties follow a set pattern. They usually begin with the tribe giving up all its rights to large areas of land. In the next Article, the Indians reserve for their own exclusive use and possession a much smaller area. This is their reservation -- because they have reserved it.

In some treaties -- such as those of the salmon fishing tribes of the West Coast -- the Indians also reserved a right to fish in their usual places off-reservation.

Other tribes reserved off-reservation hunting. This is also a reservation by the tribe. The off-reservation right was always something that mattered to the Indians greatly -- often more than the land itself -- and they specifically reserved it.

When states have tried to tax income earned by Indians on their reservations, or in the exercise of their treaty rights, the United States, as the tribes' guardian, has taken the states to court and won. I argued one of those cases in the Supreme Court -- McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973). There, the Court held -- reaffirming earlier cases -- that the states could not tax income earned by Indians on their reservations.

For most of the Nation's history, the United States itself never tried to tax Indian income or property. The Indian treaties contemplated that the Indian would have the full benefit of the little they reserved for themselves. The United States did not try to tax such use of treaty-protected resources.

In recent years, the federal government has been very conflicted -- and the Indians have been the victims of that intense conflict. The Interior Department has continued to defend Indian immunities from federal taxation where treaty rights are being exercised -- such as in treaty fishing.

The Internal Revenue Service, however, has pressed for the broadest possible taxation of Indians -- requiring a specific treaty provision or statute exempting Indians if they are to be immune from any federal tax. This seems particularly unfair and ironic to Indians. There was no federal income tax or federal property tax at the time their treaties were made. Nor was there any threat of federal taxation. Naturally the treaties do not expressly prohibit what was never even imaginable. The rule applied to the states seems more appropriate. Indians would pay tax on use of reserved lands or the exercise of reserved rights only if Congress expressly authorizes it.

The United States has attempted to resolve its internal conflicts several ways. In some cases it has actually filed split briefs -- with the IRS view and Interior view each stated. In others it has sent the issue to the Office of Legal Counsel of the Justice Department for resolution. But OLC has little experience in taxation or Indian law -- and no real sense of the government's special relationship with the Indian tribes.

The split within the government exists because the law -- and thus the will of Congress -- is not clear. And this is the principle reason why legislation is needed.

The leading case in this area is the Supreme Court's decision in Squire v. Capoeman, 351 U.S. 1 (1956). In Squire, the Supreme Court, ruling against the IRS position, held that the proceeds received by an Indian allotee from the sale of timber cut from a trust allotment are exempt from federal income tax. The Court held that the exemption was necessary to fulfill the purposes of the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. 331 et seq. Under the Allotment Act, tribal lands on many reservations were allotted to individual Indian owners. Allotments made under the Act are held in trust by the United States for the individual Indian owner, and at the end of the trust period are to be conveyed to the allottee or his or her heirs in fee "free of all charge or incumbrance whatsoever." 25 U.S.C. 348. (The trust period on most Indian allotments has been extended indefinitely.)

The Court in Squire inferred from this language that Congress' purpose was not to tax the income "directly derived" from allotted lands during the trust period. The Court quoted with approval an opinion of the Attorney General, stating "it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian." 351 U.S. at 8, quoting 34 Ops. Atty. Gen. 439, 445 (1925). The Court also noted (Id at 6)

> We agree with the Government that Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens. We also agree that, to be valid, exemptions to tax laws should be clearly expressed. But we cannot agree that taxability of respondents in these circumstances is unaffected by the treaty, the trust patent or the Allotment Act.

Since then there have been a series of revenue rulings giving expansive or restrictive interpretations to the Squire language. There have also been a series of court decisions parsing the words of the Supreme Court as only lawyers can do. Income derived directly from property protected by the allotment acts has received protection from federal taxation -- but with many disputes over the meaning of directly. Farming income is direct and protected, income from commercial establishments is not. But identical income from treaty land does not receive this protection. Indian A, who has an allotment, has his farming income protected, while his neighbor Indian B, who has treaty-protected land assigned him by the Tribe for his farm, gets no protection. The result is technical and foolish. The land and other rights -- such as fishing -- protected by treaty, statute, or executive order as part of a tribe's homeland, deserve at least as much tax immunity as the land allotted to an individual.

S. 727 does not correct all these problems --but it does correct an important one -- it provides specific

Congressional protection for income from treaty fishing. It sides with the Secretary of the Interior on this rather than the IRS or Justice Department. The bill also resolves the issue so that years of expensive litigation are not needed. It also makes sure that Indian fishermen are not wiped out by having to pay back taxes they justifiably believed they did not owe.

I have one technical suggestion. The amendment protects "rights to fish secured by such treaty or executive order". There are three ways reservations are established, and with them, fishing rights, not two. Once the treaty making period ended, Indian reservations were established by statutes (often with the same language as the earlier treaties) or by executive order. The statute should say "treaty, statute, or executive order."

I appreciate the opportunity to present these views. I would be happy to answer any questions that I can.

PREPARED STATEMENT OF MICHAEL CLEMENTS, PRESIDENT INTERTRIBAL TIMBER COUNCIL

This testimony is presented on behalf of the Intertribal Timber Council. The Intertribal Timber Council is an organization of 49 tribes with timber interests. Our members' reservations include approximately six million acres of forest land with an annual allowable cut of approximately one billion board feet of timber.

While the main focus of our organization is on timber issues, many of our member tribes have reserved treaty fishing rights. Our organization is quite concerned about general issues and policies that could affect the rights of our members. We try to monitor current developments and policies on behalf of our members and keep them informed.

We are now extremely concerned about the FY 1988 BIA budget proposal to drastically reduce funding for BIA forestry activities and to charge a fee to tribes to offset the Government's costs. We believe this is a clear abrogation of the trust responsibility that the United States holds on behalf of tribes and their members.

Likewise, we see the attempted imposition of any tax on fishing income as a partial abrogation of treaty rights. There is no more well-established principle of Indian law than that rule which holds that treaties are to be interpreted as the Indians understood them. It is absolutely inconceivable that our ancestors, who were so concerned about the preservation of their essential rights, could have understood that the Government would impose a tax upon the exercise of their treaty rights. Long before the coming of the non-Indian, our people took fish and used them for ceremonial purposes, for subsistence purposes, and also for commercial purposes and barter and trade. To the extent that any tax is imposed on fishing income, the treat right is diminished.

Experience has taught us that a threat to one right is a threat to all rights. A diminishment or abrogation of any treaty right or trust responsibility is a diminishment or abrogation of the whole. We therefore very much favor the principles underlying this act and support and urge its passage.

Thank you very much.

PREPARED

STATEMENT IN SUPPORT OF S. 727,

INDIAN FISHING RIGHTS LEGISLATION

Submitted to the Senate Select Committee on Indian Affairs

April 7, 1987

by

Cindy Darcy, Legislative Advocate, Native American Advocacy Project,
Friends Committee on National Legislation

Ted Zuern, Associate Director,
Bureau of Catholic Indian Ministries

Owanah Anderson, Staff Officer, Native American Ministries
Episcopal Church

Jay Litner, Director, Washington Office, Office for Church and Society
United Church of Christ

Charles Bergstrom, Executive Director,
Lutheran Office for Governmental Affairs

As representatives of religious denominations, the Bureau of Catholic Indian Missions, Episcopal Church, Friends Committee on National Legislation, Lutheran Office for Governmental Affairs, and United Church of Christ Office for Church and Society add our strong support for S. 727, which would clarify that income derived from the exercise of fishing rights guaranteed to Indian tribes by treaty or executive order is not subject to federal taxation. All of our denominations have been involved, in one way or another, both in seeking to assist Indian people as they ask for and direct our help in meeting the physical, economic and spiritual needs of their communities, and in adding our voice in advocacy to seek a just public policy in the federal government's dealing with Native Americans.

The Lummi Tribe of northwestern Washington, and the other Pacific Northwest tribes who are among those who are the subject of S. 727, gave up the majority of their lands in the treaty-making process of the 19th century. According to the historical record, in less than one year in the mid-1850's, Governor Isaac I. Stevens was able, by threat and promise, to secure almost 65 million acres of lands for the United States from ten Indian treaty councils from the coast of what is now Washington State to western Montana. In these treaties of land cession, the tribes reserved their rights to hunt, fish and gather where they have done so since time immemorial. The Lummis' Treaty of Point Elliott, negotiated in 1855, like the five other "Stevens treaties," contained language that "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory..."

Treaties with Indian nations were intergovernmental contracts which, as the Supreme Court stated in 1905 in United States v. Winans, were "not a grant of rights to the Indians but a grant of rights from them." Rights -- primarily to millions of acres of land and resources -- were granted TO the United States BY or FROM sovereign Indian nations. Under the "reserved rights doctrine," rights -- to land, water, hunting or fishing, governmental powers -- which were not expressly granted away by tribes to the United States in a treaty or taken away by a later federal statute, were reserved by that tribe.

By contrast, the December, 1985, opinion of the Justice Department argued the reverse of the "reserved rights doctrine," holding that unless treaties made in the mid-1800's specifically exempted Indians from income taxes, they could be taxed for income derived from the exercise of fishing rights protected by that treaty. This opinion, in effect, takes the view that, in 1855, Indian and non-Indian treaty signers had to foresee a federal tax law that was not enacted until 1913.

In weighing cases in Indian law and interpreting treaty language, the courts have also developed several "canons of treaty construction." The three "canons," used by the Supreme Court on the seven separate occasions on which it upheld the treaty fishing rights of Washington tribes, apply here: Treaty language should be construed in the sense of the words as the Indians understood them (Minnesota v. Hitchcock, 1901, and U.S. v. Shoshone Tribe, 1937); ambiguous expressions in treaties, agreements and statutes should be resolved in favor of the Indians (Carpenter v. Shaw, 1930); and treaties must be construed in favor of the Indians (Tulee v. Washington).

The Treaty of Point Elliot was negotiated by an interpreter who spoke a trade language that the Indians generally did not understand. Tribal representatives understood the treaty to continue to allow them to fish and harvest as before. Because the right to harvest fish was the very lifeline of Indian society, it can well be assumed that the Lummi and other Indians would not have agreed to any treaty which denied them not only their lands but the right to receive their livelihoods from the land.

Using the yardstick that treaties should be interpreted as the Indians would have understood them, the Department of the Interior upheld the tribe's position in its 1983 and 1985 opinions, stating, "Indians who were parties to the ... treaties understood that they would be able to continue fishing and trading fish without, in any way, having to turn over to the Federal Government a portion of their catch." We applaud the consistent position of the Department of the Interior in upholding the tax exempt status of treaty-protected resources, and are grateful for the perspective of Indian law that Interior is able to bring to this issue of taxation.

Furthermore, the courts have held that treaties cannot be abrogated in a backhanded way, but there must be a clear and explicit language from Congress (Menominee Tribe v. United States, 1968). In the Lummi case, Congress could have made clear its intent to tax Indians when it passed the Internal Revenue Code, which it did not. Also, while the Supreme Court in Lone Wolf v. Hitchcock held that Congress had the power to abrogate a treaty, it has also held that no administrative agency may abrogate a treaty or diminish tribal rights without express authorization from Congress (Menominee, and Oneida Indian Nation v. County of Oneida, 1974). Absent that congressionally delegated authority, no administrative agency, such as the Internal Revenue Service, has the power to interpret or reinterpret the language of federal-Indian treaties.

Finally, while the Internal Revenue Service may argue that American citizenship subjects Indian people to taxation on income from treaty-protected resouces, the 1924 "Indian Citizenship Act" states that the "granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property" -- i.e., treaty rights. The courts have ruled that treaty rights are a form of property, and are not individual rights based on race, but political rights recognized as reserved by tribes, and are handed down from generation to generation as property and contract rights.

Since time immemorial, Northwest tribes have harvested salmon and other fish from coastal waters, a right which was specifically recognized and reserved in treaties. Salmon had, and continue to have, a central place in tribal beliefs and ceremonies, as well as forming the basis of their economy and livelihood. Since 1982, when the Internal Revenue Service first began its efforts to tax the fishing income of Lummi tribal members, the tribe has argued that it is exempt from such taxation under the terms of the 1855 treaty. Like other Americans, tribal members pay taxes on income earned off the reservation. But because Indian tribes possess sovereign powers over their own internal affairs, which include control over natural resources, income derived from such resources has been exempt from state and federal taxes.

Today, the Lummi have the largest fishing fleet in the United States, an enterprise operated by approximately 1,000 tribal members which earns some $10 million dollars in gross income for the tribe each year. The Interior Department estimates that tax payments from fishing income of these tribal members might net $70,000 for Treasury Department coffers. For that small an amount of revenue, the Internal Revenue Service would have the United States government lay down its pledge made to Indian nations in treaties, statutes and executive orders.

As faith organizations, we strongly oppose Internal Revenue Service attempts to sacrifice the word of our nation. We regard treaties between the United States and Indian nations to be inviolable and sacrosanct covenants. Our thanks goes to Senators Adams, Bradley, DeConcini, Evans, Inouye and McCain for sponsoring S. 727, and for their leadership in stating clearly that, with regard to the taxation of treaty-protected resources, Congress intends to honor United States agreements made with Indian tribes.

PREPARED
STATEMENT OF LEVI GEORGE BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

GOOD AFTERNOON MR. CHAIRMAN AND COMMITTEE MEMBERS. MY NAME IS LEVI GEORGE AND I AM A MEMBER OF THE YAKIMA INDIAN NATION TRIBAL COUNCIL. I APPEAR BEFORE YOU HERE TODAY ON BEHALF OF THE COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, WHICH INCLUDES THE TRIBAL FISH AND WILDLIFE COMMITTEES OF THE YAKIMA, UMATILLA, WARM SPRINGS AND NEZ PERCE TRIBES.

THE COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION WISHES TO EXPRESS ITS SUPPORT OF S.727.

MR. CHAIRMAN, OUR TRIBES SIGNED TREATIES WITH THE U. S. GOVERNMENT IN THE 1850'S, LONG BEFORE THERE WAS AN INCOME TAX. THEY RESERVED TO THEMSELVES RIGHTS TO THE FISHERY RESOURCE, A RESOURCE THAT HAS BEEN PART OF THE TRIBES' LIVELIHOOD FOR THOUSANDS OF YEARS. EACH OF OUR TRIBES DEPENDS ON FISHING AS A SOURCE OF OUR SOCIAL, RELIGIOUS AND ECONOMIC WELL-BEING. NEITHER PARTY SIGNING THE TREATY CONTEMPLATED THAT THE EXERCISE OF A RIGHT RESERVED BY TREATY WOULD BE SUBJECT TO TAXATION BY THE OTHER PARTY.

OUR PEOPLE LIVING ALONG THE RIVER AND ON THE RESERVATION HAVE FEW OPPORTUNITIES FOR THEIR LIVELIHOOD. THE FISH RUNS HAVE BEEN POOR FOR MANY YEARS BECAUSE OF THE BUILDING OF DAMS AND OTHER FACTORS ALONG THE COLUMIBA RIVER. ONLY RECENTLY HAVE SOME FISHERIES BEGUN TO RECOVER.

WITHOUT THIS LEGISLATION THE CURRENT SITUATION OF FEAR AND UNCERTAINTY WILL CONTINUE. TRIBES WILL NOT HAVE A CLEAR KNOWLEDGE OF THEIR RIGHTS AND POWERS RELATING TO THE FISHERIES. ALSO, SEVERAL NORTHWEST TRIBES NOW TAX THEIR FISHERMEN. DOUBLE TAXATION OF AN ALREADY DEPRESSED INDUSTRY WOULD BE UNJUST.

WE PRESENT THIS SUPPORTIVE TESTIMONY BASED SOLELY ON THE FISHERY ISSUE. OTHERS MAY ADDRESS OTHER CONCERNS AS THEY MAY RELATE TO TRUST AND TREATY MATTERS. WE WOULD ASK THAT THE COMMITTEE REAFFIRM THE POLICY THAT INCOME FROM TREATY FISHING ACTIVITY IS NON-TAXABLE AND CONFIRM THE POLICY OF TRIBAL SOVEREIGNTY AND TREATY RIGHTS.

FINALLY, MR. CHAIRMAN, WE WISH TO COMMEND THE SENATORS WHO HAVE DEVELOPED THIS LEGISLATION AND WHO ARE WORKING TO GET IT PASSED.

WE WILL CONTINUE TO WORK WITH THIS COMMITTEE TO MAKE CERTAIN THAT THIS LEGISLATION IS PASSED AND THAT THE IRS IS PREVENTED FROM CARRYING OUT THIS MISGUIDED POLICY.

PREPARED STATEMENT
OF THE
GREAT LAKES INDIAN FISH AND WILDLIFE COMMISSION
BEFORE THE SENATE SELECT COMMITTEE
IN SUPPORT OF
S.727

My name is James H. Schlender. I am the Executive Administrator of the Great Lakes Indian Fish and Wildlife Commission. This testimony is submitted in favor of S.727.

The Great Lakes Indian Fish and Wildlife Commission is an intertribal organization of eleven Chippewa tribes possessing off-reservation hunting and fishing rights in substantial portions of Wisconsin, Minnesota, Michigan, and the United States waters of Lake Superior.

Since 1972, the rights of the Red Cliff and Bad River Tribes, located on the Wisconsin shore of Lake Superior, to take and sell fish from the Lake has been unquestioned. Recognition of the Bay Mills Tribe's right to commercially fish the Michigan waters of the Lake dates to 1979, and of the Keweenaw Bay Tribe's right, to 1971. And only last month the District Court for the Western District of Wisconsin held that all of the Wisconsin Chippewa tribes possess the right to take and sell the produce of the land, including deer, fish, wild rice, and more, found in the northern one-third of Wisconsin.

The tribal commercial fishing industry continues to be one of the largest non-governmental sources of employment for five of our member tribes: Grand Portage, Red Cliff, Bad River, Keweenaw Bay, and Bay Mills. These tribal governments currently license 150 Lake Superior commercial fishing operations bringing in over $1 million to depressed reservation economies.

The sale of on-reservation wild rice and furs has always contributed an important source of cash to tribal economies. The recent District Court decision can be expected to expand tribal reliance on treaty-reserved resources as income-generating resources. Great Lakes Indian Fish and Wildlife Commission management efforts have the potential to yield wild rice harvests of 500,000 lbs. annually and provide a source of revenue totaling $1.4 million.

Should the income derived from these resources be exempt from taxation? The Commission strongly believes they should. The issue is not one of law, since it is within the power of Congress to set the law; the issue is one of public policy, of ethics, of what is right. These considerations dictate the wisdom of a tax exemption, and can be summarized as follows:

1. Great nations, like great men, keep their word. Despite the numerous lawsuits that have been brought in the Upper Midwest resulting in the recognition of tribal treaty rights, none has resulted in any suggestion that the Indians understood at treaty time that the rights they were reserving could be burdened by taxation. While the law requires the Courts to interpret treaties as the Indians understood them, the ethical obligation of fair dealing, often characterized as the trust responsibility, requires Congress to interpret the treaties the same, and to not do violence to them.

2. Rational federal policy should encourage the development of earned income on the reservation. The tax exemption proposed by S.727 is consistent with recommendations of the Task Force on Indian Economic Development which has stressed development of natural resources and the establishment of Indian Enterprise Zones. The very concept of Indian Enterprise Zones is formed on the basis of offering tax relief to encourage capital investment. Tax exemption will maximize the benefits of market forces, stimulate investment of private capital, and expand job opportunities. A policy which, by taxation, discourages such activity in favor of reliance on income-transfer programs makes no sense as a matter of fiscal or social policy.

3. Tribes would not reap an unfair competitive advantage over non-Indians by virtue of a tax exemption. Commercial treaty resources are usually either scarce, such as lake trout, or available as a commercial commodity only to Indians. As to a scarce resource such as lake trout, the market will absorb all that can be produced. As to a resource available for commercial exploitation only by Indians--for instance, venison under the recent Wisconsin decision--non-Indians cannot engage in income-generating activities in relation to such resources anyway. In most cases, therefore, no competitive advantage will accrue to Indians doing business free of income taxation.

In sum, exemption from taxation of Indian income derived from treaty resources is a matter of sound fiscal and social policy, has no negative impacts on non-Indians, and reaffirms the United States commitment to honoring its treaties.

PREPARED

STATEMENT OF THE TRIBAL COUNCIL OF THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS CONCERNING S. 727

Washington, D.C.

March 27, 1987

The Tribal Council of The Confederated Tribes of the Warm Springs Reservation of Oregon has reviewed S. 727 and wishes to express its wholehearted support for this important legislation.

Warm Springs is a treaty fishing tribe. Like other Pacific Northwest tribes, our forefathers negotiated and expressly reserved in an 1855 treaty with the United States the right to carry on forever the traditional food-gathering activities which we have practiced since the beginning of time. These treaty-protected, food-gathering rights form the foundation of our tribal culture and religion.

Perhaps the most important of these rights is the right to fish. We reserved in our 1855 treaty the exclusive right to fish the streams running through and bordering our reservation, and we also reserved the right to fish at all other usual and accustomed places in common with the non-Indian settlers coming into our country.

These reserved rights were an especially important part of the negotiations leading to the Warm Springs treaty. In this treaty, our forefathers agreed to move to a reservation many miles from their traditional home along the Columbia River and its tributaries. Our principal fisheries were on the Columbia and the lower reaches of its tributaries. In order to maintain our tribal way of life on a reservation far from the river, it was essential that we retain the right to leave the reservation to fish at our traditional places, as well as hunt for game, gather berries, dig for roots and graze our animals, in our traditional areas outside the reservation boundaries. For that reason, these rights were all specifically reserved in our 1855 treaty and have been exercised and enjoyed by virtually every member of our tribe for the one hundred thirty-two years that have passed since the treaty was signed.

It has always been our belief that the rights reserved in our 1855 treaty were absolute rights which could not be infringed upon or diminished by the states or the federal government. We also understood that our treaty created a trust relationship with the United States which obligated the Federal Government to protect and preserve our treaty rights. Consequently, we are very disturbed that it is the United States, rather than a state or local government, that is now trying to diminish our treaty rights by taxing the exercise of treaty-reserved fishing rights by tribal members. The Warm Springs Tribal Council strongly believes that this effort is a breach of the Federal Government's trust responsibility to protect our treaty rights. We also believe it is an unlawful infringement on what are our absolute, treaty-protected rights.

S. 727, which we strongly support, is not a tax exemption. Instead, it is a clarification, similar to the legislation concerning judgment fund distributions and tribal per capita payments, which expresses Congress's intention that Indian trust resources and treaty-protected activities are not to be infringed or encumbered by federal taxation.

While passage of this legislation will resolve the present controversy concerning the taxation of Indian fishing rights, there is great concern among Indian tribes across the country that the Internal Revenue Service is moving toward taxing other trust resources and treaty-protected activities. It has even been suggested that the IRS may soon attempt to tax Indian tribal governments.

Indian tribal governments have never been subject to the Internal Revenue Code. The only confirmation of that policy, however, is contained in an IRS revenue ruling and an opinion of the Solicitor of the Department of Interior. Unfortunately, IRS revenue rulings are subject to change by the IRS, and Interior Solicitor's Opinions, as shown by the present treaty fishing tax controversy, are easily ignored by the IRS.

Although this legislation does not speak to the taxability of Indian tribal governments or other treaty-protected activities besides fishing, the Warm Springs Tribal Council urges the Committee, if it should pass this important bill, to consider putting language in the Committee report expressing Congress's intent that Indian tribal governments and treaty-reserved activities in general are not be taxed. Coming from the only committee in Congress with special expertise and authority in the field of Indian Affairs, such report language would give the Nation's Indian tribes and Indian people much-needed reassurance that the Federal Government, and in particular the United States Congress, is truly our trustee and the protector of our ancestral rights preserved by treaty and executive order.

Thank you very much.

TULALIP TRIBE'S LEGAL MEMORANDUM IN SUPPORT OF S. 727

A BILL TO CLARIFY INDIAN TREATIES AND
EXECUTIVE ORDERS WITH RESPECT TO FISHING RIGHTS
BEFORE THE
SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

APRIL 9, 1987

I.

INTRODUCTION

This Memorandum is submitted on behalf of the Tulalip Tribes of Washington in support of S. 727, a Bill which would clarify the non-taxable status of income derived by Indians from the exercise of fishing rights secured by treaties and executive orders. Stanley G. Jones, Sr., Chairman of the Tulalip Tribes, testified before the Senate Select Committee on Indian Affairs at its March 27, 1987 hearings on S. 727 and submitted a written statement for the hearing record. This Memorandum supplements that testimony and statement.

This Memorandum is also intended to supplement the discussion contained in the September 21, 1983 Opinion rendered by William H. Coldiron, then Solicitor for the Department of the Interior, and the March 12, 1985 Opinion rendered by Frank K. Richardson, the then Solicitor of the United States Department of the Interior, reaffirming Solicitor Coldiron's opinion that income derived by Indians from the exercise of reserved treaty fishing rights are not subject to federal income taxation. A copy of each opinion is submitted herewith.

Also submitted herewith is a copy of an affidavit of Barbara Lane, a well-respected anthropological authority on the treaties in question.

II.

THE TREATIES

The Tulalip Tribes of Washington ("Tribe") is a federally recognized Indian Tribe organized pursuant to the Indian Reorganization Act of 1934. The Tribe is a successor of several of the tribes and bands which signed the Treaty of Point Elliott in 1855 (12 Stat. 927), and has reserved treaty fishing rights under that Treaty. *See*, *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974)("*United States v. Washington*), *Aff'd.* , 520 F. 2d 676 (C.A. 9 1975), *cert. denied*, 423 U.S. 1086 (1976), *substantially aff'd.*, *Washington v. Fishing Vessel Ass'n.*, 443 U.S. 658 (1979) ("Fishing Vessel"); and *United States v. Washington*, 459 F. Supp. 1020, 1039, 1058-60 (W.D. Wash. 1974-78) ("Post-Trial Decisicns"). The Treaty of Point Elliott is one of the six treaties negotiated with Washington tribes by territorial Governor Isacc Stevens ("Stevens Treaties"). *Fishing Vessel*, 443 U.S. 662, Fn. 2.

In the Stevens Treaties, Washington tribes voluntarily ceded their title to vast areas of land reserving but small reservations for their exclusive use. Fishing Vessel, 443 U.S. 662. The United States induced the tribes to reach this peaceful resolution of their title claims, and thereby avoided the possibility of armed conflict, by assuring the tribes that the treaties would reserve their fishing rights, that the United States would protect those rights and that they would be secure. The reserved treaty fishing rights were the principal economic benefit retained by the Indians in the bargain thus made. It is inconceivable the Indian negotiators would have agreed to the treaties if it had been in any way suggested that their future entitlement to the benefits of the reserved treaty rights could in any way be impaired or diminished by the United States through taxation or otherwise.

When the relevant treaties were signed, the anadromous fishery had tremendous importance to Washington Indian tribes ("...all of them shared a vital and unifying dependence on anadromous fish." 443 U.S. 664). At and long before treaty times, the commercial harvest and sale of anadromous fish was used to provide the Indians' livelihood. Fishing Vessel, 443 U.S. 665 ("fish constituted a major part of the Indian diet, and was used for commercial purposes, and indeed was traded in substantial volume."). The Supreme Court took special note of the Indians' extensive commercial trade in fish:

> "'At the time of the treaties, trade was carried on among the Indian groups throughout a wide geographic area. Fish was a basic element of the trade. There is

> some evidence that the volume of this intra-tribal trade was substantial, but it is not possible to compare it with the volume of present day commercial trading in salmon. Such trading was, however, important to the Indians at the time of the treaties. In addition to potlatching...there was a considerable amount of outright sale and trade beyond the local community and sometimes over great distances. In the decade immediately preceding the treaties, Indian fishing increased in order to accommodate increased demand for local, non-Indian consumption and for export, as well as to provide money for purchase of introduced commodities and to obtain substitute non-Indian goods for native products which were no longer available because of the non-Indian movement into the area. Those involved in negotiating the treaties recognized the contribution that Indian fishermen made to the territorial economy because Indians caught most of the non-Indians' fish for them, plus clams and oysters.' 384 F. Supp. at 351-352 (citations to record omitted). See also, id. at 364, (Makah Tribe 'maintained from time immemorial a thriving economy based on commerce' in 'marine resources')."

Fishing Vessel, 443 U.S. 665, fn 7. The Supreme Court also noted that:

> "In late December 1854, one territorial official wrote the Commissioner of Indian Affairs that '[t]he Indians on Puget Sound...form a very considerable portion of the trade of the Sound.... They catch most of our fish, supplying not only our people with clams and oysters, but salmon to those who cure and export it.'"

Fishing Vessel, 443 U.S. 666, fn 8.

During the treaty negotiations, the United States negotiator, Territorial Governor Isaac Stevenson, and his associates,

> "...were well aware of the 'sense' in which the Indians were likely to view assurances regarding their fishing rights. During the negotiations, the vital importance of the fish to the Indians were repeatedly emphasized by both sides, and the Governor's promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent." (Emphasis added)

Fishing Vessel, 433 U.S. 676.

The Supreme Court recognized that "...these treaties confer enforceable special benefits on signatory Indian tribes", and, in rejecting the state's argument that the treaties only conferred an equal opportunity to fish, the Court noted that:

> "Such a 'right', along with the $207,500 paid the Indians, would hardly have been sufficient to compensate them for the millions of acres they ceded to the Territory."

Fishing Vessel, 443 U.S. at 673, fn. 20 and 677.

As indicated, the vital importance of the fishery to the Indians was repeatedly emphasized during the treaty negotiations. This is hardly surprising given the fact that the treaty fishery was the principal economic resource reserved by the Indians under the Stevens treaties in which they ceded title to millions of acres of land. As noted by the Supreme Court, the United States' promises that the treaties would protect that source of commerce were crucial in obtaining the tribes' agreement to the treaties, which resulted in peaceful resolution of Indian title claims to vast areas without armed conflict. In thus resolving such matters by negotiation, the Washington tribes relied heavily on the promises and assurances made by the United States negotiators and upon the good faith and honor of the United States. The Indians were vitally interested in protecting the fishing rights they reserved in the treaties, and

> "...they were invited by the white negotiators to rely and in fact did rely heavily on the good faith of the United States to protect that right."

Fishing Vessel, 443 U.S. 667.

In relying upon the United States' good faith and honor in the treaty negotiations, the tribes were in a particularly vulnerable and disadvantageous position due to the language barriers that existed. In its discussion of the Indian negotiators' vital interest in protecting their reserved fishing rights, and their heavy reliance upon the good faith of the United States to do so, the Supreme Court noted that

> "There is no evidence of the precise understanding the Indians had of any of the specific English terms and phrases in the treaty."

Fishing Vessel, 443 U.S. 666. The difficulty arose due to inadequacies in the "Chinook jargon" in which the treaty was explained to the Indians:

> "Indeed, the translation of the English words was difficult because the interpreter used a 'Chinook jargon' to explain treaty terms, and that jargon not only was imperfectly (and often not) understood by many of the Indians, but also was composed of a simple 300-word commercial vocabulary that did not include words corresponding to many of the treaty terms."

Fishing Vessel, 443 U.S. 667, fn 10.

The long-recognized rule of Indian treaty interpretation is that the United States, the party with superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. Therefore, Indian treaties are construed in the sense they would naturally be understood by the Indians - not according to technical legal meanings:

> "A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations. (Citations omitted). When the

> signatory nations have not been at war and neither is the vanquished, it is reasonable to assume that they negotiated as equals at arm's length. There is no reason to doubt that this assumption applies to the treaty at issue here. (citation omitted).
>
> "Accordingly, it is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule. It has held that *the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. '[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.'* (citation omitted). This rule, in fact, has thrice been explicitly relied on by the Court in broadly interpreting these very treaties in the Indians' favor...." (emphasis added)

Fishing Vessel, 443 U.S. 675-676. 1/

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1. In applying this principle of interpretation to the Stevens treaties, it is important to keep in mind that the Indians fishing rights were not granted by the United States to the tribes, but rather were pre-existing rights of the Indians which were reserved. In this classic statement of the "reserved rights" doctrine, the Supreme Court noted the limited right to share in the fishery which the Indians gave to the non-Indians:

> "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, *upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed.* New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them - a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds as dealings between private individuals." (Emphasis added).

United States v. Winans, 198 U.S. 371, 381 (1905).
(Continued on next page)

In negotiating the Stevens treaties, the United States' negotiators did not bargain for, or even request, that the Indians confer upon the United States any right to restrict or impair the Indians' reserved fishing rights, either by taxation or otherwise. As the Supreme Court noted in *Fishing Vessel*:

> "There is nothing in the written records of the treaty councils or other accounts of discussions with the Indians to indicate that the Indians were told that their existing fishing activities or tribal control over them would in any way be restricted or impaired by the treaty. The most that could be implied from the treaty context is that the Indians may have been told or understood that non-Indians would be allowed to take fish at the Indian fishing locations along with the Indian. 384 F. Supp. at 357."

Fishing Vessel, 443 U.S. 668, fn 12. *Id.* While records are clear that the United States' negotiators were well aware of and intended to protect the Indians' existing commercial fishery, *see* Affidavit of Barbara Lane, nothing in the negotiation records indicates in any way that the United States intended to tax the benefits of the Indians' reserved fishing rights. *Id.* The United States' negotiators did not in any way suggest to the Indians that the United States intended to or would be able to tax the benefits of their reserved fishing rights. *Id.*

(Footnote 1 continued)
See also *Mason v. Sams*, 5 F.2d 255, 258 (W.D. WA 1925). The Indians kept what they did not grant. The United States received only that which was granted. Given this inherent aspect of the transaction, it could not be expected that the Indians understood or even had a reason to suspect that the United States would receive a right to take away any portion of the Indians income from their reserved fishing, unless the Indians agreed their reserved rights would be subject to such diminishment.

The treaty negotiation records do not indicate that Governor Stevens told the Indians the United States would take away any portion of the income they derived from fishing. The treaty negotiation records do indicate that Governor Stevens told the Indians:

> "Are you not my children and also children of the Great Father? What will I not do for my children, and what will you not for yours? Would you not die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home?... This paper secures your fish. Does not a father give food to his children?"

Fishing Vessel, 443 U.S. 667, fn 11. The Indians could not have understood such assurances to mean they would have to pay the United States any portion of their fishing income or give the United States any portion of the fish they caught.

Given the serious limitations of the Chinook jargon, elaborate circumlocutions would have been needed in order to explain the concept of a tax upon the fishery to the Indian negotiators. See Affidavit of Barbara Lane. No such language or explanation is found in any of the records of the Treaty Councils. Id. It is simply inconceivable that the Indians had any understanding that the United States would subsequently be able to tax away the reserved treaty fishing benefits which were the essence of the Indians' treaty bargain, or that they would have signed the treaties if they had been told this. Indeed, the Indians had every reason to believe that their ceding of millions of acres of land was the only payment they would ever have to make to enjoy the total protection the treaty would provide to their reserved fisheries, both as a source of food and commerce. \2

It is beyond question that taxation would be a serious impairment and dimishment of the reserved treaty fishing rights. As the Supreme Court has noted, the "...power to tax the exercise of a privilege is the power to control or suppress its enjoyment." Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943).

In Tulee v. Washington, 315 U.S. 681 (1942), the United States Supreme Court held that the State of Washington's imposition of a license fee upon the exercise of the reserved treaty fishing right could not be reconciled with a fair construction of the treaty and was thus impermissible. The treaty in question was one of the Stevens treaties. The State

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2. If the United States did indeed have some unexpressedintention to deprive or diminish the benefit of the Indians' reserved fishing rights through taxation, and failed to express this intent to the Indians in the treaty negotiations, this tactic would certainly constitute the utmost in bad faith and dishonorable dealings and an absolute flaunting of the United States' negotiators' responsibilities "to avoid taking advantage of the other side". The Tribe simply does not believe that the United States' negotiators had any such dishonorable intention to lure the Indians into a treaty based upon solemn promises to protect the reserved fishery as a vital source of commerce, and later diminish those benefits through income taxation. Indeed, the federal income tax was not even enacted until more than sixty years after the treaties were made, and then only after the Sixteenth Amendment was adopted to make such taxation constitutional. In any event, even if such unexpressed intention had existed, the well-established rules of treaty interpretation discussed above would prevent any such result.

had sought to impose the fee as a condition of the Indians' exercise of the reserved treaty fishing right. The Court in Tulee noted that the issue must be addressed by viewing the treaty in light of the Court's

> "...responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this Nation to protect the interest of a dependent people"

The Court held that

> "...exaction of fees as a prerequisite to the enjoyment of fishing in the 'usual and accustomed places' cannot be reconciled with a fair construction of the treaty."

315 U.S. at 685. The Court noted that such a fee impermissibly "...acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve." Id. Sampson Tulee was an individual Yakima treaty fisherman who was represented by the United States in the litigation. The view of the treaty adopted by the Supreme Court was the same as that advocated by the United States.

In Puyallup Tribe v. Department of Game (Puyallup I), 391 U.S. 392, 401, fn 14, the Supreme Court referred to its holding in Tulee, citing Murdock v. Pennsylvania, supra, for the proposition that the power to tax the exercise of a privilege is the power to control or suppress its enjoyment, and made clear that the Tulee prohibition upon charges on the reserved treaty fishery was not limited to license fees, but included taxation in general.

While the issue before the court in Tulee v. Washington involved a state charge, the principle applies to the United States as well. The limitations imposed by the treaties upon the state's authority occur by virtue of the supremacy clause of the United States Constitution. The United States, as a party to the treaties, is, of course, directly bound by them. United States v. Winans, 198 U.S. 371, 381-382. Hoh v. Baldridge, 522 F. Supp. 683. (W.D. Wa. 1981).\3 In fact, in Mason v. Sams, 5 F. 2d 255 (W.D. Wa. 1925), the protections of the Stevens Treaties were applied to prevent the United States from charging a royalty of 5%-25% upon the gross fishing receipts of a member of the Quinault Tribe. The Commissioner of Indian Affairs had sought to impose such a royalty, and the Court held that the Commissioner lacked the authority to impose this levy because the treaty guaranteed the fishing rights of each individual member of the Tribe and the federal government had no right to take a share of these fish for its own purposes, no matter how beneficial these purposes might seem. 5 F. 2d at 158.

The Commissioner of Internal Revenue certainly has no more

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3. In Winans, the Court stated:

> "The reservations [of fishing rights] were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein...and the right was intended to be continuing against the United States and its grantees."

198 U.S. at 381-82.

right to take a portion of the Indian's fish, or a portion of the income derived from the Indian's commerce in such fish, than did the Commissioner of Indian Affairs. The results in Tulee v. Washington and in Mason v. Sams are entirely consistent with and required by the assurances given by the United States negotiators that the treaties would protect the source of commerce provided by the Indian's reserved fishing rights. It is very surprising and upsetting to the Tribe that any agency of the United States would suggest, in modern times, that the treaties do not provide such protection and that the United States may freely go back on its word and take away any portion of the income treaty fishermen earn from the reserved treaty fishery. S. 727 provides an important and timely opportunity for Congress to reaffirm the nation's word given in the Stevens Treaties by clarifying for all time the non-taxable status of treaty fishing income.

III.

TAXATION OF TREATY FISHING INCOME IS INCONSISTENT WITH THE UNITED STATES TRUST RESPONSIBILITIES

The signing of the Stevens Treaties placed "...substantial duties upon the United States." No Oilport! v. Carter, 521 F. Supp. 334, 373 (W.D. Wash. 1981). As indicated, the United States negotiators expressly promised the Indians that the treaties would "secure" their reserved fishery and the United States promises that the treaties would protect that source of commerce were crucial in obtaining the Indians assent. The responsibilities of the United States to guard and protect the promised treaty benefits are also:

> ...reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people. This Court has previously emphasized 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.' Seminole Nation v. United States, 316 US 286, 296, 86 L.Ed. 1480, 62 S.Ct. 1049 (1942). This principle has long dominated the Government's dealings with Indians. United States v. Mason, 412 U.S. 391, 398, 37 L.Ed. 2d 22, 93 S.Ct. 2202 (1973); Minnesota v. United States, 305 U.S. 382, 386, 83 L.Ed. 235, 59 S.Ct. 292 (1939); United States v. Shoshone Tribe, 304 U.S. 111, 117-118, 82 L.Ed. 1213, 58 S.Ct. 794 (1938); United States v. Candelaria, 271 U.S. 432, 442, 70 L.Ed. 1023, 46 S.Ct. 561 (1926); McKay v. Kalyton, 204 U.S. 458, 469, 51 L.Ed. 566, 27 S.Ct. 346 (1907); Minnesota v. Hitchcock, 185 U.S. 373, 396, 46 L.Ed. 954, 22 S.Ct. 650 (1902); United States v. Kagama, 118 U.S. 375, 382-384, 30 L.Ed. 228, 6 S.Ct. 1109 (1886); Cherokee Nation v. Georgia, 5 Pet. 1, 17, 8 L.Ed. 25 (1831).

United States v. Mitchell, 463 U.S. 206, 77 L.Ed. 2d 580, 596-597 (1983).

Under this trust relationship an Indian tribe is "entitled to rely on the United States, its guardian, for needed protection for its interests." United States v. Creek Nation, 295 U.S. 103, 110 (1935). It is the federal government, rather than the states or local governments, which have this special role as protector. United States v. Kagama, 118 U.S. 375, 384 (1886).

The duties imposed by the trust relationship apply to all federal agencies (including the Internal Revenue Service) when they are dealing with Indian interests. Seminole Nation v.

United States, supra; Nance v. Environmental Protection Agency, 645 F.2d 701, 711 (9th Cir. 1981); e.g., Hoh v. Baldridge, supra.

The federal trustee is subject to at least the same standards applicable to private trustees. United States v. Mason, 412 U.S. 391, 398 (1973); Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238, 1245 (N.D. Cal. 1973). However, Seminole Nation v. United States, supra, suggests even a higher standard than that imposed on private trustees. As President Nixon pointed out in his 1970 message to Congress, 116 Cong. Rec. at 231-35, "[e]very trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill."

The treaty reserved right to take fish is an expressly protected property interest which the United State has a trust responsibility to protect from diminishment. Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir. 1981), cert. denied 102 S.Ct. 657 (1981); Whitefoot v. United States, 293 F.2d 658, 659 (Ct. Cl. 1961), cert denied, 369 U.S. 818 (1962); Pyramid Lake Paiute Tribe v. Morton, 345 F. Supp. 252 (D.D.C. 1973). Northern Paiute Tribe v. United States, 30 Ind. Cl. Comm. 210 (1973).

To the extent the Indians are made to give up part of their catch, or the proceeds from the commerce in their catch, the promises of the United States negotiators that the treaties would protect and make secure that source of commerce, are absolutely meaningless. Prior to the treaties "there was not a shadow of impediment" upon the Indians' fishery as their principal source of commerce. The treaties certainly do not purport to confer upon the United States any right to now create such an impediment, either in the form of a tax which requires a direct payment to the United States (the other party to the treaty) of income earned from commerce in fish, or which requires the Indians to deliver to the United States a portion of their catch. Any taxation, or attempt at taxation, of this treaty protected source of fishery commerce would be an absolute and total breach of the United States' trust responsibilities and a repudiation of the solemn promises and assurances made by the United States treaty negotiators.

IV.

THE INTERNAL REVENUE CODE DOES NOT ABROGATE THF TREATIES

While Congress' power to abrogate a treaty exists, such intention is not to be lightly imputed. See, Menominee Tribe v. United States, 391 U.S. 404, 412-413 (1968), where the Court stated:

> "While the power to abrogate those rights exists (see Lone Wolf v. Hitchcock, 188 U.S. 553, 564-567...), the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress. Pigeon River Co. v. Cox Co., 291 U.S. 138, 160... See also, Squire v. Capoeman, 351 U.S. 1...."

In considering whether a particular statute evidences a congressional intent to abrogate a treaty, the courts have always resolved doubts in favor of the Indians by attributing to Congress an intent to act in the manner most consistent with the Nation's trust obligations:

> "While there is legally nothing to prevent Congress from disregarding its trust obligations and the abrogating treaties or passing laws inimical to the Indians' welfare, the courts, by interpreting ambiguous statutes in favor of Indians, attribute to Congress an intent to exercise its plenary power in the manner most consistent with the Nation's trust obligations. See Squire v. Capoeman, 351 U.S. 1, 7-8, 76 S. Ct. 611, 100 L. Ed. 883 (1956)."

Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 660 (CA 9 1975), cert. denied 429 U.S. 1038. The courts have generally required express language sufficient to indicate a congressional intent to abrogate a treaty right. See, e.g., Menominee Tribe v. United States, supra, 391 U.S. at 408-410. In Menominee, the Supreme Court refused to construe legislation terminating the federal relationship with the Menominee Tribe as a backhanded abrogation of implied hunting and fishing rights which were not mentioned. Id.

Nothing in the Internal Revenue Code, or its legislative history, contains even the slightest reference to the Indians' reserved treaty fishing rights, much less an indication that Congress intended to abrogate or partially abrogate the treaties by taking away all or part of their reserved benefits through taxation.

As property rights, the Indians' reserved fishing rights are subject to the protection of the Fifth Amendment of the United States Constitution. Accordingly, Congress' power to modify treaties is subject to the Fifth Amendment's taking clause. Shoshone Tribe v. United States, 299 U.S. 476 (1936); Choate v. Trapp, 224 U.S. 665 (1912). Presumably, if Congress had intended Internal Revenue Codes to abrogate or partially abrogate the treaties, by taxing away all or part of the fishing benefits reserved thereunder, it would have expressly said so, both in the statute and its legislative history, and would have established a fair and just procedure for determination and payment of the Fifth Amendment compensation claims that would arise from the taking. The total absence of any congressional statement on these subjects:

> "...has significance in the application of the canons of construction applicable to statutes affecting Indian immunities, as some mention would normally be expected of such a sweeping change in the [taxation] status of tribal government and reseration Indians had been contemplated by Congress."

Bryan v. Itasca County, 426 U.S. 373, 381 (1976).

Such canons of construction are, of course, unnecessary when Congress itself has the opportunity to speak to the issue directly. S 727 provides a vehicle by which Congress may send a clear message rejecting the notion that, by enacting the Internal Revenue Code, Congress in any way intended to disregard its trust obligations and abrogate or partially abrogate the Stevens treaties by taxing away the benefits of the fishery commerce the United States gave its word the treaties would protect.

I.

CONCLUSION

Any conclusion that treaty fishing income, or a portion of the tribal treaty catch, may be taken away through taxation or otherwise cannot be reconciled with assurances given the Indians during the treaty negotiations, with their understanding of the treaty, or with the long-established rule of treaty construction that the United States has a duty to avoid taking advantage of Indians in treaty negotiations, particularly where the treaty is expressed in a language the Indians do not understand.

The essence of the treaty bargain was an assurance to the Tribes that their traditional reliance upon fishing for self-support would continue without encumbrance. Historically, both the Tribes and the United States have recognized that treaty fishing income is not subject to taxation. The Solicitor of the Department of the Interior, whose treaty interpretations are entitled to great weight, has recently reaffirmed the long accepted understanding that treaty fishing income is not subject to federal taxation.

The Tribes believe that the United States negotiators acted in good faith when they gave the word of the nation and that the

United States would not later repudiate the solemn promises made by the treaty negotiators, and try to force the Tribes to make further payments to the United States, in addition to the heavy price their ancestors have already paid to reserve an unencumbered fishing right.

All federal agencies, including the Internal Revenue Service, share the federal trust responsibility to protect the Tribe's treaty fishing rights from diminishment.

The Tribes believe that Congress did not intend to abrogate any part of the treaties when it passed the Internal Revenue Code.

In the Tribe's view, Congress should adopt S. 727 as an important reaffirmation of the Federal Government's commitment to honor the Nation's word given in 1855 treaties with Washington Indian tribes and to honor the Federal Government's trust responsibilities under those treaties.

S. 727 is also consistent with President Reagan's strongly worded American Indian Policy Statement, issued on January 23, 1983, which reaffirms the Federal Government's commitment to the promotion of tribal self-sufficiency and economic development.

Respectfully submitted,

BELL & INGRAM, P.S.

By
Douglas L. Bell/James R.
Jones, Jr., General Counsel
Tulalip Tribes of Washington

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 23, 1987

Honorable Daniel K. Inouye
Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This is in response to your letter of March 16, 1987, requesting the views of the Department of Justice on S. 727, a bill to clarify Indian treaties and executive orders with respect to fishing rights. The legislation relates to the taxation of income derived by Indians from certain fishing rights. Your letter also invited us to present testimony regarding S. 727 at a hearing scheduled for March 27, 1987.

The Justice Department defers to the views of the Departments of Treasury and Interior concerning this legislation. Inasmuch as we have no position on the legislation, our appearance at the hearing to testify on S. 727 would not serve any useful purpose and, accordingly, we respectfully decline your invitation to testify.

Sincerely,

John R. Bolton
Assistant Attorney General

church council
of greater seattle
4759 Fifteenth Avenue N.E. - Third Floor
SEATTLE, WASHINGTON 98105
Telephone 525-1213

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March 19, 1987

Senator Daniel K. Inouye, Chair
The Select Committee on Indian Affairs
U.S. Senate
Washington, D.C. 20510

Dear Senator Inouye,

The Church Council of Greater Seattle, Washington, strongly supports Senate Bill 727. We work closely with the Lummi Tribe here in Washington. It is our belief that the attempts of the IRS to tax members of the Lummi tribe for the exercise of their rights to fish as secured by the Point Elliott Treaty of 1855 is a major injustice that will have great ramifications if allowed to continue in taxing other areas of reservation activity when the IRS so decides.

We concur with Senator Daniel Evan's words that Senate Bill 727 is needed to "reaffirm our commitment to many Indian tribes to preserve their rights to fish commercially for salmon and steelhead, and to receive the fruits of their labor". Further, we agree with the words of Senator Brock Adams that S.B. 727 "sends a message to the IRS that Congress strongly disapproves of efforts to tax tribal resources protected by treaties or executive orders".

We are grateful to you, Senator Inouye, for the strong leadership you are giving to rectifying this effort by the IRS to abrogate United States trust responsibilities.

Sincerely,

William B. Cate

(The Rev. Dr.) William B. Cate
President - Director

Harold Culbertson
Co-Chair, Native American Task Force

Jon Magnuson

The Rev. Jon Magnuson
Co-Chair, Native American Task Force